INTERIOR BOARD OF LAND APPEALS

United States
v.
Lyle I. Thompson, et al.

68 IBLA 64 (March 16, 2006)

UNITED STATES

v.

LYLE I. THOMPSON, ET AL.

IBLA 2002-414 Decided March 16, 2006

Appeal from a decision by Administrative Law Judge James H. Heffernan declaring the Tin Cup #12, #13, and #14 mining claims valid, the Tincup #16 mill site claim valid, and the Tincup #17 mill site claim invalid. IMC 166557-59, 166561-62. Mineral Patent Application IDI-28704.

Affirmed in part as modified, and reversed in part.

1. Administrative Procedure: Adjudication--Contests and Protests: Government Contests--Evidence: Presumptions--Mining Claims: Contests--Rules of Practice: Government Contests--Rules of Practice: Appeals: Jurisdiction

   Where BLM's administrative record does not contain a date-stamped copy verifying that BLM timely received contestees' answer to a Government contest complaint, but the record contains substantial corroborating evidence establishing that it is more probable than not that the document was received timely, the legal presumption of regularity, which would ordinarily operate to force a conclusion that the Answer was untimely, is rebutted, and the Office of Hearings and Appeals retains jurisdiction to adjudicate the contest.

2. Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Determination of Validity

   In order to establish that a deposit of building stone is an uncommon variety locatable under the Common Varieties

Act, (1) there must be a comparison of the mineral deposit with other deposits of such minerals generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market or reduced cost of production resulting in greater profit.

3. Administrative Procedure: Adjudication--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Contests--Rules of Practice: Government Contests--Rules of Practice: Hearings

When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. When the Government's prima facie case has been made, the claimant has the ultimate burden of persuasion to show by a preponderance of the evidence that a discovery of uncommon building stone has been made and is present within the limits of the claim.

4. Evidence: Generally--Evidence: Sufficiency--Evidence: Weight--Mining Claims: Common Varieties of Minerals: Generally--Rules of Practice: Evidence

While the Board generally accords substantial deference to the findings of an Administrative Law Judge with respect to conflicting evidence, such deference is not absolute, and the Board will closely examine the judge's findings in order to ensure that they are legally sound and supported by the record.

5. Materials Act--Mining Claims: Common Varieties of Minerals: Generally--Mining Claims: Marketability

That a stone deposit on a mining claim can be profitably marketed is not enough by itself to validate a claim located for uncommon building stone. The claimant must still establish that the deposit is not a common variety of building stone.

6. Materials Act--Mining Claims: Common Varieties of Minerals: Special Value

Where the evidence, when considered as a whole, including photographs and rock samples entered into evidence by contestees, establishes that a deposit of micaceous quartzite does not produce stone of consistent uncommon quality, the deposit cannot be considered to have unique properties giving it distinct and special value.

7. Materials Act--Mining Claims: Common Varieties of Minerals: Special Value--Mining Claims: Common Varieties of Minerals: Unique Property

An attribute in a deposit of uncommon building stone that imparts a distinct and special value reflected by either a higher price for the product or reduced costs of production resulting in a higher profit must be inherent in the deposit itself and cannot be predicated on extrinsic factors. Where profits inuring from the sale of building stone resulted primarily from the nature of commercial arrangements, and not from any unique property intrinsic to the deposit, mining claims located for uncommon building stone are properly declared null and void.

APPEARANCES: Barry Marcus, Esq., and Michael Christian, Esq., Boise, Idaho, for the Thompsons; Kenneth M. Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

This matter involves a Government contest of three mining claims and two related mill site claims under mineral patent application IDI-28704 filed by Lyle I., Anita M., and Kevin L. Thompson, who located the claims for an uncommon variety of

building stone. The claims are situated on the Idaho-Montana border approximately 75 miles north of Idaho Falls, Idaho, in the Centennial Mountains and within the Targhee National Forest. The Bureau of Land Management (BLM) has appealed a May 24, 2002, decision of Administrative Law Judge James H. Heffernan which denied its motion to dismiss the proceedings and declared all but one of the contested claims and sites valid. BLM argues that Judge Heffernan erred in denying its motion to dismiss, and in determining that the contestees established the presence of a valuable mineral deposit for uncommon building stone on the mining claims. We first turn to the question of whether Judge Heffernan properly denied the motion to dismiss.

On October 2, 1991, the Thompsons filed a mineral patent application with the Idaho State Office, BLM, for three placer building stone mining claims and three mill sites, the Tin Cup #12 through #17 (IMC 166557-62). (Patent Application, Mineral Patent Application (MPA) file IDI-28704.) [1/] Lyle Thompson (Thompson) later amended the application to reflect that he no longer intended to apply for a patent to the Tin Cup #15 mill site (IMC 166558) (Letter in the MPA file from Lyle Thompson to Buneta Wilson dated June 22, 1992; see also Complaint, Ex. A; Mineral Report (Ex. 4 at 1; Ex. 39.) [2/] The mining claims remaining in the patent application are located in Lot 1 (Tincup #12), Lot 2 (Tincup #13), and Lot 3 (Tincup #14) of sec. 8, T. 14 N., R. 42 E., Boise Meridian, Fremont County, Idaho. (Mineral Report (MR) at 1.) The mill site claims are located in the E½NE¼NE¼NE¼ (Tincup #16), and the SW¼NE¼NE¼NE¼ and NW¼SE¼NE¼NE¼ (Tincup #17) of sec. 24, T. 14 N., R. 41 E., Boise Meridian. Id. The three placer claims contain 133.4 acres. The two mill sites contain five acres each. Id.

BLM issued a First Half Final Certificate to Thompson on September 21, 1992. (Complaint, Ex. A.) Thereafter, BLM geologist Charles Horsburgh conducted a mineral examination of the claims. Horsburgh issued a Mineral Report on October 17, 1997 (Ex. 4, Title Page), finding that a discovery of a valuable mineral deposit on the claims could not be verified.

[1/] The file forwarded to the Board by Judge Heffernan did not include the MPA file. We therefore presume that Judge Heffernan did not have access to the documents in the MPA file unless they were introduced into evidence at the hearing. The Board requested the MPA file from Idaho State Office, BLM, and received it on June 22, 2005.

[2/] Unless otherwise noted, all references to exhibits refer to those introduced at the hearing. Exhibits introduced by the Government are identified by number; those introduced by the contestees are identified by letter. (Tr. 13.)

Accordingly, on November 25, 1997, BLM initiated a Government contest by filing a contest complaint in the Idaho State Office pursuant to 43 CFR 4.451-2 and 43 CFR 4.450-3, [3/] charging that (1) minerals had not been found within the limits of the mining claims in sufficient quantities or qualities to constitute a valid discovery of a valuable mineral deposit; (2) the mineral material found within the claims was not a valuable mineral deposit "under Section 3 of the Act of July 23, 1955"; [4/] and (3) the Tincup #16 and #17 mill site claims were invalid because they are not associated with valid placer claims. The complaint requested that the Thompsons' mineral entry be cancelled, and the Tincup mining claims and related mill site claims be declared null and void.

Certified mail receipts attached to the original Complaint confirm that the Thompsons received the contest complaint on December 2, 1997. The Complaint included the following notice:

> **This complaint is filed in the** Idaho State Office, **Bureau of Land Management,** * * * 1387 South Vinnell Way, Boise, Idaho 83709, **and any papers pertaining thereto shall be sent to such office for service on the contestant, and to** Mr. Ken Sebby, Field Solicitor, Dept. of Interior, Fed. Bldg., MSC Box 020, Boise, ID 83724. ***Unless contestee(s) files (file) an answer to the complaint in such office within thirty (30) days after service of this notice and complaint, the***

[3/] Regulation 43 CFR 4.451-2 states that "[t]he proceedings in Government contests shall be governed by the rules relating to proceedings in private contests" and lists several exceptions not applicable here. Regulations found at 43 CFR 4.450 pertain to private contests. The regulation at 43 CFR 4.450-3 provides inter alia, that "[a]ny person desiring to file a private contest must file a complaint in the proper land office (see § 1821.2-1 of chapter II of this Title)," and that the contestant (in this case, BLM) serve contestees with a copy of the complaint "not later than 30 days after filing the complaint."

[4/] The Multiple Use Mining Act of July 23, 1955, also known as the Surface Resources Act or the Common Varieties Act, 30 U.S.C. § 611 (2000), excluded deposits of common varieties of stone, sand, and gravel, from location as mining claims, providing that they would no longer be deemed valuable mineral deposits under the mining laws. This statutory provision of the Common Varieties Act has been upheld as applicable to common varieties of building stone. United States v. Coleman, 390 U.S. 599 (1968). Section 3 of the Common Varieties Act defined the term "common varieties" to exclude "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." 30 U.S.C. § 611 (2000).

> ***allegations of the complaint will be taken as admitted and the case will be decided without a hearing. Any answer should be filed in accordance with Title 43, Code of Federal Regulations, Part 4, Subpart E, a copy of which is attached.***

An answer accordingly had to be filed no later than January 2, 1998, the first day BLM's offices were open following the New Year's Day Federal holiday. On December 19, 1997, Lyle Thompson mailed a letter, directed specifically to Departmental Field Solicitor Ken Sebby, the person identified in the notice, entitled "Mineral Patent application IDI-28704 appeal of notification dated November 25th, 1997 whereas request for patent was denied" (Answer), which clearly responded to the November 25, 1997, Complaint and is plainly a cognizable answer. (Statement of Reasons for Appeal (SOR) at 4; Answer at unnumbered 1.) The Answer was received on December 22, 1997, at the Field Solicitor's address set forth in the Complaint. (SOR at 4.) The Answer did not indicate that Thompson mailed a copy to the Idaho State Office, BLM, although copies to other persons were noted, including then Idaho Senator Dirk Kempthorne. (Answer at unnumbered 3.)

On January 26, 1998, the Idaho State Office received a letter from Senator Kempthorne dated January 20, 1998, directed to Martha G. Hahn, Idaho State Director, and requesting information concerning Thompson's letter to Sebby. The Idaho State Director's office replied to Kempthorne on February 13, 1998, describing the circumstances leading to issuance of the complaint, and explaining: "If the claimant denies the allegations of the complaint within 30 days, as Mr. Thompson did, an administrative hearing * * * is held by an administrative law judge." (Letter signed by Elena C. Daly for Martha G. Hahn, Idaho State Director, BLM, to Senator Dirk Kempthorne dated February 13, 1998; emphasis added.) Further, the letter stated: "The final administrative determination of the validity of Mr. Thompson's claims will be made by an administrative law judge after hearing. Since Mr. Thompson answered the complaint in a timely manner, he will be furnished a copy of the * * * mineral report within the next week or two." Id. (emphasis added).

On March 16, 1998, the Office of Hearings and Appeals, Salt Lake City Regional Office, received a "Transmittal of Contest or Other Proceeding for Hearing," from the Idaho State Office, BLM, along with the original complaint, Kempthorne's inquiry with Thompson's Answer attached, and BLM's February 13, 1998, reply to Kempthorne. On April 6, 2001, Judge Heffernan scheduled the contest for hearing, to be held on May 22, 2001. On May 10, 2001, attorneys for Thompson requested a continuance, stating that they had just been retained. On January 15-18, 2002, Judge Heffernan held a hearing in Idaho Falls, Idaho.

The Motion to Dismiss

At the onset of the hearing, counsel for BLM moved to dismiss the proceedings [5/] pursuant to Departmental regulations governing contest procedures on the basis that Thompson's Answer was untimely filed. (Tr. 14.) While counsel conceded that Thompson had timely filed his Answer with the Office of the Solicitor, he argued that the Idaho State Office did not receive the Answer until January 26, 1998, when it was forwarded with Senator Kempthorne's inquiry, which was well after the 30-day time limit imposed by Departmental regulations within which to answer contest complaints. Thompson opposed the motion, claiming that the Idaho State Director had admitted the Answer was timely received in her February 13, 1998, response to Kempthorne. Judge Heffernan denied the motion from the bench, ruling, inter alia, that the letter on behalf of the Idaho State Director states that BLM in fact received the Answer, and therefore constitutes a waiver of BLM's right to raise the objection. (Tr. 24, 25.) BLM renewed the motion to dismiss in its post-hearing brief. In his May 24, 2002, decision, Judge Heffernan noted that Thompson's Answer was "timely filed in the office of the counsel of record for the BLM State Office." (Decision at 3.) He denied the motion to dismiss on grounds that (1) the motion was itself untimely, as it was not made until commencement of the hearing; (2) the instructions in the Complaint would lead a reasonable layman to believe that the Answer was to be filed with the Solicitor, and, therefore, Thompson's filing was sufficient; and, (3) in any event, the State Director's letter waived the 30-day time limit set forth in 43 CFR 4.450-6. (Decision at 2-4.)

The relevant departmental regulation, 43 CFR 4.450-6, provides, in pertinent part: "Within 30 days after service of the complaint * * *, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint * * *." This Board has held that 43 CFR 4.450-6 is mandatory and may not be waived. E.g., Eric E. Wieler, 160 IBLA 284, 286 (2004), and cases cited. When an answer is not timely filed, the allegations of the complaint will be taken as admitted, and BLM will decide the case without a hearing. 43 CFR 4.450-7.

On appeal, BLM argues that Judge Heffernan erred in denying the motion to dismiss and maintains that Thompson failed to timely file the Answer in the proper Government office, relying, inter alia, on our decision in U.S. v. Grooms, 146 IBLA 289 (1998). (SOR at 9-11.) In Grooms, BLM's complaint was issued to multiple contestees. Grooms' attorney filed an answer more than 30 days after the contest complaint was served on Grooms. The attorney stated that he had been advised by a

[5/] Counsel actually moved to dismiss the "complaint" (Tr. 14); however, the context makes clear that he intended to move for dismissal of the contest proceedings.

BLM employee, in accordance with provisions of the BLM Manual, that the answer would be timely filed if it was filed within 30 days of the date the last contestee received the Complaint. The attorney filed an answer on behalf of Grooms after the 30-day time period had expired, and Judge Heffernan, to whom the case was assigned, granted BLM's motion to dismiss the proceedings on grounds that Grooms' Answer was untimely. On appeal, the Board rejected Grooms' claim that the mandatory provisions of 43 CFR 4.450-6 were waived by the oral representations of BLM employees, or by provisions of the BLM Manual. U.S. v. Grooms, 146 IBLA at 292-94. Citing Grooms and similar cases, BLM contends that compliance with the 30-day time limit imposed by 43 CFR 4.450-6 cannot be waived.

Thompson argues that BLM's reliance upon Grooms is "inapposite," as the facts before us are more like the situation in George M. Reedy, 120 IBLA 274 (1991). (Response to Government's Statement of Reasons (Response) at 2-3.) In Reedy, the contestees received a contest complaint from the California State Office, BLM, on September 6, 1988. Their answer was received on September 22, 1988, by the Bureau of Reclamation, at 2800 Cottage Way in Sacramento, instead of BLM, which also has offices at 2800 Cottage Way. Id. at 275-76. The contestees had represented that they forwarded copies to two addressees, set out in the answer as (1) "United States Department of the Interior, Bureau of Land Management, California State Office"; and (2) "Chief, Branch of Adjudication, and Records, Office of Regional Solicitor, U.S. Department of the Interior, 2800 Cottage Way, Room E 2753, Sacramento, CA 95825." Id. at 275. The record, however, contained no documentation of receipt by BLM until June 27, 1989, over nine months later. Id. at 276. BLM issued a decision stating that the allegations in the complaint were taken as admitted, as Reedy had failed to timely file an Answer. On appeal, the Board held that the absence of proof in the file that the document had been timely filed ordinarily gives rise to a presumption that no answer was received by BLM during the crucial 30-day time period; however, the presumption was rebutted by the particular facts in evidence, which established that it was more probable than not that the answer had been received by BLM in a timely manner. Id. at 277-78.

In the Reedy opinion, we noted that the answer had been received at the proper location but in the wrong office, and would customarily have been transmitted by inter-office mail from offices of the Bureau of Reclamation to the California State Office, BLM, as the Department has long recognized an obligation "to react to erroneous actions of members of the public with reasonable dispatch." The inter-office transmission would undoubtedly have been accomplished before expiration of the 30-day period, our opinion concluded. George M. Reedy, 120 IBLA at 276-78. We pointed out that the evidence was "sufficient to overcome the presumption that the answer was not filed timely with BLM based on the absence of that document in BLM's files." Id. at 278. We also cautioned: "It is important to note, however, that

this case presents an unusual set of factual evidence and any similar case must be examined in light of the particular facts of that case." Id. BLM maintains that the Thompsons' reliance on Reedy is misplaced, as "[t]he Boise Field Solicitor's Office is not a sister or constituent agency of the Bureau of Land Management, nor is it authorized to accept filings or service on behalf of the BLM." (SOR at 12.) BLM further contends that "[t]he unusual set of facts in Reedy are not present in this case," and "jurisdiction should not be acquired" by service on the Solicitor. Id.

[1] Judge Heffernan's decision denying BLM's motion to dismiss reached the right result, and we accordingly affirm it, although on different grounds than those articulated in his decision. As we explain more fully below, we agree with contestees that the relevant facts in evidence more nearly resemble those in Reedy, rather than the situation described by Grooms.

Before turning to that discussion, however, we address Judge Heffernan's discussion of the filing instructions set forth in the Complaint. Judge Heffernan ruled that the instructions "are ambiguous on their face," and were reasonably construed by Thompson, a layman appearing pro se, to require the answer to be filed only with Sebby. (Decision at 2-3.) As Thompson addressed his answer specifically to Sebby and mailed it to the address for Sebby set forth in the Complaint, where it was timely received within the 30-day filing deadline, it is reasonable to conclude that Thompson in fact thought Sebby was the person to whom the Answer was properly directed. Nonetheless, all persons doing business with the Government, even those who appear pro se, are presumed to know the content of the regulations. E.g., John T. Millhouse, 142 IBLA 106, 108 (1997); Jim Wright, 138 IBLA 297, 299 (1997). Regulation 43 CFR 4.450-6 provides, in pertinent part: "Within 30 days after service of the complaint * * *, the contestee must file in the office where the contest is pending an answer specifically meeting and responding to the allegations of the complaint, together with proof of service of a copy of the answer upon a contestant as provided in Sec. 4.450-5(b)(3)." [6/] The Complaint clearly stated that it was "filed" in the Idaho State Office. Moreover, the Complaint directed the Contestee to file both with the

[6/] As we noted in n.3 supra, 43 CFR 4.451-2 directs that private contest rules are to be applied to Government contests. This application often creates an unwieldy construction, as demonstrated by 43 CFR 4.450-6, which requires a contestee to provide the Department with proof of service on the contestant. When applied to private contests, the requirement is clear; applied to Government contests, the language requiring proof of service on the contestant is superfluous and ultimately meaningless, as the Government is the contestant. Unfortunately, the language in the Complaint Notice suffers from the same malady. However, the language in 43 CFR 4.450-6 setting forth where the Answer is to be filed is clearly stated.

Idaho State Office and with the Field Solicitor, citing the regulations in 43 CFR Part 4 Subpart E, a copy of which was attached.

We agree with BLM that service on the Solicitor is not equivalent to service on BLM. But we are not disposed to reverse Judge Heffernan's ruling on the basis that Thompson mistakenly sent the Answer to the wrong Government office. The salient question is, is it more likely than not that Thompson's Answer was timely received in the proper Government office? The opinion in Reedy, which discusses in detail the presumption of regularity, bears relevance to this inquiry. We quote:

> The absence of evidence of timely receipt of [an] answer in BLM's case file gives rise to a rebuttable presumption that no answer was received by BLM during the crucial 30-day time period. See James L. Gleave, 112 IBLA 281, 284 (1990); Ben Swartzentruber, Jr., 94 IBLA 344, 345-46 (1986). The presumption stems from the general presumption that public officials properly discharge their duties and do not lose or misplace legally significant documents. See Wilson v. Hodel, 758 F.2d 1369, 1372 (10th Cir. 1985); Legille v. Dann, 544 F.2d 1, 8-9 (D.C. Cir. 1976); H. S. Rademacher, 58 IBLA 152, 155, 88 I.D. 873, 875 (1981). However, the presumption arising from the absence of a particular document may be rebutted by substantial corroborating evidence which establishes that it is "more probable than not" that the document in question was received by BLM in a timely manner. See James L. Gleave, supra at 285.

George M. Reedy, 120 IBLA at 276-77. See also National Wildlife Federation, 162 IBLA 263, 266 (2004); Tom Hash, 140 IBLA 244, 245 (1997). Thus, the presumption of regularity would ordinarily operate to force a conclusion that, because BLM records do not contain an Answer from Thompson date-stamped as timely received at the Idaho State Office, Thompson's Answer was not timely filed.

In this case, there is substantial corroborating evidence that establishes that BLM timely received the disputed Answer. We base our conclusion on the contents of two documents generated by the Department: an April 10, 1998, memorandum from Ken Sebby to the Idaho State Office (Sebby Memorandum) located in the MPA file (which was not provided to Judge Heffernan (see n.1 supra)), and the February 13, 1998, State Director's letter to Senator Kempthorne.

On April 10, 1998, Ken Sebby forwarded a memorandum to the Idaho State Office discussing "the possibility of filing a motion to dismiss based upon the

Contestant's [sic] [7/] failure to file a timely response with BLM." The Memorandum stated:

> You will recall that [the Thompsons] never filed an answer with BLM but that I forwarded to BLM the [contestee's] "Mineral Patent Application IDI-28704 appeal of notification dated November 25th 1997, whereas request for patent was denied." I received it on December 22, 1997 in an envelope dated December 19, 1997. I do not know when it was received by BLM (nor the date the [contestees] received the Complaint -- as evidenced by the green [return receipt requested] cards).
>
> In any event, please let me know the date(s) that the [contestees] received the 11-25-97 Complaint and the date you received their "Answer" from me.

(Emphasis added.)

There is no documentation in the MPA file confirming that the Idaho State Office responded to that request. However, Sebby's Memorandum establishes that he forwarded the Answer to the BLM State Office at some point. The letter by Elena C. Daly for Martha Hahn, Idaho State Director, responded to Senator Kempthorne's inquiry with a definitive statement that Thompson had "answered the complaint in a timely manner." Considered together, the Sebby Memorandum and BLM's response to Senator Kempthorne constitute "substantial corroborating evidence" sufficient to overcome the presumption of regularity that Government officials have not lost or misplaced legally significant documents. In particular, we cannot draw any significance from the absence in the record of Thompson's original answer, when Sebby's memorandum unequivocally states that he forwarded it to BLM. State Office personnel must have had some basis for concluding that the Answer was timely. Accordingly, we hold that it is more probable than not that Thompson's Answer was received from Sebby timely, and was not placed in the record. We therefore affirm as modified Judge Heffernan's denial of BLM's motion to dismiss the contest proceedings for lack of jurisdiction. See George M. Reedy, 120 IBLA at 278; Elizabeth D. Anne, 66 IBLA 126, 128 (1982), quoting H.S. Rademacher, 58 IBLA 152, 156-57, 88 I.D. 873, 876 (1981).

We now turn to the merits of the appeal.

[7/] Counsel clearly intended to refer to the contestees, rather than the contestant, which is, in this case, the Government. We have accordingly modified the quoted material from Sebby's Apr. 10, 1998, Memorandum.

Legal Context

[2] Lands chiefly valuable for building stone and not otherwise withdrawn or reserved were made subject to location as placer mining claims by the Act of August 4, 1892. 30 U.S.C. § 161 (2000). However, Section 3 of the Multiple Use Mining Act of July 23, 1955, also known as the Surface Resources Act or the Common Varieties Act, 30 U.S.C. § 611 (2000), excluded deposits of common varieties of stone, sand, and gravel, from location as mining claims, providing that they would no longer be deemed valuable mineral deposits under the mining laws. This statutory provision of the Common Varieties Act has been upheld as applicable to common varieties of building stone. United States v. Coleman, 390 U.S. 599 (1968). Section 3 of the Common Varieties Act defined the term "common varieties" to exclude "deposits of such materials which are valuable because the deposit has some property giving it distinct and special value."

The definitive standard for distinguishing a deposit of an uncommon variety of stone under 30 U.S.C. § 611 (2000) was set forth by the circuit court in McClarty v. Secretary of the Interior, 408 F.2d 907 (9th Cir. 1969). In order to establish that a deposit of building stone is an uncommon variety locatable under the Common Varieties Act, (1) there must be a comparison of the mineral deposit with other deposits of such minerals generally; (2) the mineral deposit at issue must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special value must be reflected by the higher price which the material commands in the market or reduced cost of production resulting in greater profit. See id. at 908, 909. The unique property must be intrinsic to the deposit. See United States v. Henri (On Judicial Remand), 104 IBLA 93, 99 (1994), aff'd, Henri v. Lujan, No. A90-237 (D. Ak. July 31, 1993), appeal dismissed, No. 93-35102 (9th Cir. Aug. 25, 1993).

[3] When the Government alleges that a mining claim is invalid because it was located for a mineral named in the Common Varieties Act, the Government must present sufficient evidence to establish a prima facie case that the mineral deposit does not possess a unique property giving it a distinct and special value. When the Government's prima facie case has been made, the claimant has the ultimate burden of persuasion to show by a preponderance of the evidence that a discovery of uncommon building stone has been made and is present within the limits of the claim. United States v. LeFaivre, 138 IBLA 60, 67 n.6 (1997); United States v. Multiple Use, 120 IBLA 63, 82 (1991). In the instant case, evidence introduced at the hearing establishes that Thompson removes micaceous quartzite from portions of the Tin Cup claims, which he sells locally for use in a variety of ways for which common varieties

of building stone are customarily employed, including exterior and interior decorative wall facings, fireplaces, and chimney facings (Exs. K-1 through K-3, K-6 and K-7, R-4, R-6, R-9, R-14), patio stones and patio steps (Ex. K-5); various landscaping uses including borders (Exs. K-9, R-3); retaining walls (Ex. R-82); walkways, stepping stones, and stone walls (Exs. K-8 through K-11); signposts (Ex. R-5); landscaping boulders (Tr. 74, 956-59); and other outdoor decorative uses (Exs. K-4, R-28). [8/] The question posed by the record and vigorously disputed by the parties is not whether there is a market for the stone, but whether it is marketable as an uncommon building stone under the criteria set forth in McClarty.

The Department's mineral examiner and expert, Charles Horsburgh, [9/] and the expert geologist testifying on behalf of contestees, David Cockrum, [10/] presented contrasting views concerning whether and to what extent the deposit on the Tincup claims has a "unique property" imparting to it a distinct and special value which induces either a higher price in the market or reduced costs of production resulting in greater profit. Judge Heffernan found Cockrum's testimony more persuasive than Horsburgh's, and determined that the testimony of contestees' other witnesses buttressed that of Cockrum. He therefore concluded that the contestees prepond-erated with respect to the validity of the Tincup placer claims #12, #13, and #14, and the Tincup mill site #16. (Decision at 17.)

BLM argues on appeal that Judge Heffernan did not properly apply relevant legal principles. See, e.g., SOR at 17. BLM contends that he "misunderstood several key points made by the [G]overnment" and was dismissive of Horsburgh's testimony, his mineral report, and the market survey he conducted with respect to both common and uncommon variety quartzite; he thus erroneously disregarded credible evidence.

[8/] Contestees introduced a number of photographs into evidence at the hearing demonstrating the various building uses for which stone from the claims was used; our references are not an exhaustive list.

[9/] Horsburgh received a Bachelor of Science (B.S.) degree in geology in 1975 from Brigham Young University (Ex. 1), and, at the time of the hearing, had 27 years experience with BLM (Tr. 27). He became a certified mineral examiner for BLM in 1990, and has conducted a number of mineral examinations of mining claims located for quartzite, rhyolite, travertine, and other building stone mineral materials. (Ex. 1.)

[10/] Cockrum received a B.S. in geology from the University of Idaho in 1983, and an M.S. in 1986, with an emphasis in metamorphic rocks. Cockrum has been a registered professional geologist since 1994, and has worked in precious metal and industrial mineral exploration in a variety of capacities. He was employed with the Idaho Department of Lands from 1992-1994. (Ex. II.)

(SOR at 18-28.) BLM asserts that a number of the Judge's factual findings were not supported by the record and argues that his analysis was flawed concerning whether the stone in fact commands a higher price in the marketplace than common variety stone. (SOR at 22-32.) BLM argues that the Judge failed to properly apply the McClarty criteria. (SOR at 30-31, 33.)

Contestees respond that "[t]he balance of the Government's appeal is devoted to criticism of Judge Heffernan's weighing of the testimony." (Response at 5.) They argue that the Judge's decision "was based on a weighing of the credibility of competing witnesses" (Response at 7), and that "this is precisely the kind of case in which the Board normally defers to the ALJ's factual determinations" (Response at 8). They maintain that Judge Heffernan's "factual findings were supported by substantial evidence, and should not be disturbed." (Response at 8-20.) Additionally, contestees argue that BLM failed to establish a prima facie case because it compared the Tincup stone's qualities only to those of uncommon varieties of stone, in violation of the McClarty requirements. (Response at 21-29.) We disagree, and proceed to consider whether the contestees have met their ultimate burden of persuasion of showing by a preponderance of the evidence the discovery of uncommon building stone.

[4] The Board ordinarily will not disturb a Judge's findings of fact based on credibility determinations where they are supported by substantial evidence. United States v. Miller, 165 IBLA 342, 377 (2004). However, while the Board generally accords substantial deference to the findings of an Administrative Law Judge with respect to conflicting evidence, such deference is not absolute, and the Board will closely examine the judge's findings in order to ensure that they are legally sound and supported by the record. United States v. Garcia, 161 IBLA 235, 241 (2004); see also, e.g., United States v. Lehmann & Associates, 161 IBLA 40, 88 (2004); United States v. Willsie, 152 IBLA 241, 264-65 (2000); United States v. Feezor, 130 IBLA 146, 200-01 (1994); and United States v. Dunbar Stone Co., 56 IBLA 61, 67-68 (1981), aff'd, Civ. No. 81-1271 PHX EHC (D. Ariz. Feb. 27, 1984), aff'd, Civ. No. 84-1915 (9th Cir. Jan. 24, 1985), cert. denied, 472 U.S. 1028 (1985). In United States v. Willsie, the Board stated:

> The Board of Land Appeals, as the delegate of the Secretary of the Interior, has the authority to make decisions concerning appeals relating to the use and disposition of the public lands and their resources as fully and finally as might the Secretary * * *. 43 CFR 4.1. We have previously held that:
>
> > This authority includes the power to make a de novo review of the entire administrative record and to make findings of fact based thereon. While we recognize the

> propriety of deferring to the Administrative Law Judge's findings where a witness' demeanor affects his credibility, our authority to make findings of fact which may differ from the former's is not limited by the substantial evidence rule * * *. "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision. * * *" 5 U.S.C. § 557 [(1994)]. (Emphasis in original).

United States v. Willsie, 152 IBLA at 264-65, quoting United States v. Dunbar Stone Co., 56 IBLA at 68.

Accordingly, we will examine the record in this case to determine whether Judge Heffernan's findings and conclusions are supported by the record as a whole, and are legally sound.

Summary of the Evidence

A. Topography of the Claims

The Tincup mining claims are located 20 miles northeast of Kilgore and about 15 miles northwest of Island Park, Idaho, on the south flank of the Centennial Mountain Range, which forms the boundary between Idaho and Montana from the Island Park area westward until it joins the Beaverhead Range. (Mineral Report (Ex. 4) at 5.) The claims abut the Montana border at an altitude of between 8,000 and 8,200 feet, where the ridge gently slopes southward into the Tin Cup Creek drainage. (Ex. 4 at 4.) See also Ex. B, a topographic map of the claim areas prepared by contestees, and Ex. 8, a photograph taken by Horsburgh capturing a panoramic view of the claims. An access road generally follows Tincup Creek up into the Centennial Range until the road crosses the southern border of the Tincup #12 claim. See Ex. B. The mill sites are located adjacent to the access road "downslope at an elevation of 7150 feet." (Ex. 4 at 4, Figure 3.)

BLM's Exhibit 8 was taken from the eastern corner of the Tincup #14 claim, looking back towards the northwest. (Tr. 46.) It portrays, at a distance, several outcroppings of rock exposed at varying elevations along a gently southward sloping, partially grassy area dotted with isolated stands of fir trees. (Ex. 4 at 4, Ex. 8.) It shows the access road veering sharply to the northwest, where a switchback in the road creates a shape which, on the photograph, resembles an "S" or "J" (Tr. 48), with the top horizontal line lying adjacent to an exposed outcrop. That outcrop straddles the border between the Tincup #12 and #13 claims. (Tr. 48-49.)

For purposes of establishing the location of the Tincup claims, including various locations from which Thompson testified that stone is mined, the contestees intro-duced Exhibits B (the topographic map) and C, an aerial photograph downloaded from the Internet and scaled to match survey monuments. See Tr. 989. Exhibit C illustrates ten separate areas, labeled from Q1 to Q9, including one area designated as "Q1-A." The Thompsons did not refer to the outcroppings on the claims by these labels; they were assigned to the claim areas as the result of discussions with Cockrum prior to the hearing. (Tr. 849; 994-95.) Exhibit C represents all ten areas as located with the boundaries of Tincup #13 except for Q1, which is shown straddling the border between the Tincup #12 and #13 claims, but lying primarily in Tincup #12.

The areas demarcated by contestees on Exhibit C roughly correspond to rock outcroppings or areas devoid of vegetation visible on BLM Exhibit 8. The panoramic view in Exhibit 8 shows an outcrop beginning at the switchback at Q1 and extending upslope from southwest to northeast. At the northeastern corner of the photograph, the outcrop divides, or terraces, into a triangle, the apex of which is at a point on a ridge crest which spans northeast to southeast. A ledge wide enough to support the growth of a few fir trees divides the upper and lower terraces of the triangular outcrop. This continuous outcrop roughly corresponds to Areas Q1 through Q4 as drawn on contestees' Exhibit C, with Q4 containing the triangular terraced outcrop. BLM's panoramic photograph depicts the rock on the lower terrace of Q4 as exposed in a vertical or near vertical formation. The rock at the higher elevation is exposed, but the dip of that rock is not discernible, nor is it in the other exposed areas. It is clear from the panoramic photograph that the area at Q1 has been disturbed; however, it is not possible to determine from either the panoramic photograph or Exhibit C whether rock has or has not been removed from areas Q1-A and Q2 through Q4.

A second exposure of either bare earth or rock is visible on BLM's Exhibit 8, beginning at Q1, then becoming roughly parallel downslope to the Q1-Q3 line, then veering around a stand of trees and over to the northeast to southeast ridge, downslope from Q4. That line roughly corresponds to Areas Q1-A to Q5 on contestees' Exhibit C. Other areas shown on contestees' Exhibit C – Q8, Q9, Q7, and Q6 – correspond roughly to bare areas shown on BLM's Exhibit 8. However, neither Exhibit C nor Exhibit 8 is sufficiently detailed to reveal significant details about areas Q1-A and Q5-Q9.

B. Characteristics of the Stone

1. Horsburgh's Analysis

In August 1993, Horsburgh conducted a preliminary on-site examination, which included reviewing claim boundaries and looking at workings on the claims. (Tr. 54; Ex. 4 at 2.) In October 1993, Thompson accompanied Horsburgh on a tour of the claims, pointing out claim corners, places where he had removed stone, and what types of stone he felt were present there. (Tr. 55.) Approximately three years later, on August 12-14, 1996, Horsburgh conducted a field examination of all claims affected by the patent application. (Tr. 58.) Horsburgh determined that the outcrop that "straddles the boundary between the Tincup #12 and Tincup #13 claims" was the only area where significant mining of building stone had taken place [11/] (Ex. 4 at 10; Tr. 72-74), but that "some building stone has also been removed from the quartzite outcrop on the top of the ridge on the Tincup #13 claim" (Ex. 4 at 12).

Quartzites are common to the geography of the western United States, where they are exposed at latitudes located from British Columbia to southern California, Horsburgh stated. (Tr. 103.) He listed the qualities that a quartzite deposit must possess in order to qualify as an uncommon building stone, as follows: (1) It must be capable of being split into "very thin plates," preferably, less than 1 inch in thickness, with "parallel and planer" surfaces (Tr. 104-05); (2) It must be "not highly fractured" and must be capable of producing "large plates" (Tr. 105); (3) The "planer" or "flat" material should be "platy" and have perpendicular edges (Tr. 106); (4) "It has to be hard and durable" (Tr. 107); (5) It must not be widespread (Tr. 107); and (6) The deposit must produce "large volumes of thin material" (Tr. 107).

Horsburgh identified "[i]ntense fracturing" and "lack of cleavage planes" as two major limiting factors of the stone found on the Tincup claims. In his Mineral Report, he stated that "quartzite does not possess consistent cleavage surfaces that allow the stone to be split into uniform thicknesses," and that because "a bed of massive 6 to 12 inch quartzite lies above or below a 3 to 4 inch thick bed," he "was not able to split the thicker quartzite material into thinner plates of uniform thickness." (Ex. 4 at 12.) Horsburgh's field examination led him to divide the quartzite on the Tincup claims into three general categories:

> [A]n upper ledge and cliff[-]forming unit of massive quartzite, a middle unit that contains beds that are highly fractured and are exposed in a

[11/] Thompson, however, testified that he has removed and sold building stone from areas Q1 through Q9. We will discuss Thompson's testimony infra.

> series of outcrops on the Tincup #13 claim and the northwestern corner of the Tincup #14 claim, and a lower massive ledge[-]forming unit that is exposed in the headwaters of Tin Cup Creek on the southern half of the Tincup #13 claim.

(Ex. 4 at 6; see also Ex. 7, Tr. 60-64.) Horsburgh defined "massive" as representing "a dimension in terms of thickness" greater than 4 inches. (Tr. 63.) The industry standard for facing stone requires a thickness of less than 4 inches. Id. Neither the upper nor the lower massive units, which he described as "non-bedded" (Ex. 4 at 6), contained quartzite less than 4 inches in thickness, Horsburgh stated (Tr. 63).

The upper massive unit was exposed in outcrops to the northwest of the switchback area, as demonstrated on Exhibit 7, and shown in the photographs marked Exhibits 9 and 10, Horsburgh testified. [12/] (Tr. 61-62.) According to Horsburgh, Exhibit 9 typifies the fractured upper massive quartzite beds at the northwestern part of the outcrop (Tr. 61), "on the Tincup 12 and the northwest corner of the Tincup Number 13" (Tr. 62). Exhibit 10 is a picture of rock drilled and blasted from that upper massive unit. Id.

Exhibits 11, 12, and 13 depict the bedded building stone exposed at the switchback quarry, identified by Horsburgh as the "middle quartzite unit." (Tr. 65, 67-72.) They show an outcrop with diagonal bedding planes of varying thicknesses exhibiting horizontal and vertical fractures, similar in color to the quartzite shown in Exhibits 9 and 10, but with bedding planes that are thinner and less "blocky" in appearance. Exhibit 14 is a photograph of waste rock (Tr. 569-70), which Horsburgh took to demonstrate the 4- to 5-inch-thick stone in the foreground (Tr. 79-81).

Horsburgh testified that the only exposure of a "bedded unit in the middle of the two massive units" (middle unit) was at the switchback quarry on the boundary of the Tincup 12 and 13 claims (Tr. 64), identified by contestees as area "Q1" (Ex. C). However, as we noted above, the Mineral Report states that the middle unit extended in a "series of outcrops" across the Tincup #13 claim and into the northwestern corner of the Tincup #14 claim. (Ex. 4 at 6.)

With respect to the distinguishing features of the middle unit, Horsburgh's Mineral Report stated:

> The bedded middle unit contains a higher percentage of mica (muscovite) which gives the quartzite a weak directional structure.

[12/] On Ex. C, this area is depicted within the northern portion of Q1, which is within the boundaries of Tincup #12.

> In quartz[-]rich metamorphic rocks where the micas form a foliation plane or cleavage layer that corresponds to the bedding plane, the rock can be split into thin flat plates (Maley 1985). This is not the case with the bedded middle unit exposed on the Tincup claims. The mica cleavage plane is not parallel to the bedding plane so the quartzite is only weakly foliated which produces gently undulating surfaces rather than flat surfaces. Also, there is no consistency in the thickness of the bedding planes. The middle unit is also highly fractured, probably a result of the tectonic activity that produced the Centennial Mountains. The fractures vary from several inches to several feet apart.

(Ex. 4 at 6-7.)

Horsburgh characterized the stone on the Tincup claims as having "wavy," or "abraded cleavage planes," thereby preventing it from being split into "flat, even, thin sheets." (Tr. 92.) In contrast, he stated, quartzite with "planer cleavage" or "parallel surfaces," "where the mica minerals line up with the beds in the quartzite," splits easily. (Tr. 91-92.) Horsburgh determined that the wavy nature of the stone renders it less marketable, as the stone "can not be split into thin sheets like the planer quartzites can." (Tr. 92.) Horsburgh estimated that "less than ten percent of the rock" exposed in area Q1 was "less than four inches in thickness." (Tr. 95.)

Horsburgh testified that he knows how to split stone, as he "spent many summers splitting stone, digging fossils in southern Wyoming." (Tr. 449.) "When you split stone like that," he said, "you actually start and hit it in many places in order to start a fracture pattern[;] I could not do that with the quartzite on the claims." (Tr. 93.) He attempted to split 10 to 14 Tincup stones of varying thicknesses. (Tr. 372.) Pieces broke or flaked off, but the stone did not split into thin sheets. (Tr. 514.) "[I]n most cases," he stated, "when I tried to pick what I thought was the existence of a bedding plane, it, the bedding planes in reality aren't there. So you get * * * these conchoidal fractures of the edges of the stone off because it is very hard." (Tr. 372.) "Occasionally," he testified, "a piece * * * will split partially down through and then it flakes off, but it does not split through entire pieces of the rock." (Tr. 93.) If one or two plates split into thin sheets, he testified, that would not be representative of the deposit as a whole. (Tr. 449.)

Examples of Thompson's palletized stone were depicted in photographs taken by Horsburgh, introduced as Exhibits 15 through 19. Exhibit 16 is a close-up of the stone depicted in Exhibit 15 (Tr. 83), Horsburgh testified, and demonstrates the "blocky," "wavy," "non-planer," "nonflat" surfaces of the Tincup quartzite, as do Exhibits 17-19 (Tr. 85-90). The stone on the pallets had not been sorted, Horsburgh

testified, so it was not of uniform thickness, but it was consistently thicker than 2 inches, and contained stones of thicknesses up to 8 inches. (Tr. 96.)

He stated that "the entire quartzite body on the claims is fractured, but there are a lot of fractures in the bedded middle" unit. (Tr. 97; see also Tr. 482.) Some of the fracturing at the switchback could be due to weathering, and blasting could account for some of the surface fracturing in the upper massive unit and at the switchback, he testified. (Tr. 293-96.) However, according to Horsburgh, the fractures are horizontal as well as vertical. (Tr. 286-88.) While the outcrop at the switchback is layered, Horsburgh testified, the thin layering is not primarily due to bedding planes, which would render the stone splittable, but to horizontal fracturing. Id. For example, he stated, the bedding planes shown in Exhibit 13 are, for the most part, 4 to 6 inches thick; the thinner layering is probably due to horizontal fracturing. (Tr. 283-88.) The fractures, he stated, prevent the removal of large thin plates from the outcroppings. (Tr. 97.) An example of a larger stone removed from the claims is shown in Exhibit 16, he stated, but it is not characteristic of most of the stone he observed in the pallets. (Tr. 98.)

The Tincup stone, for the most part, does not break off in perpendicular edges, but leaves a "knify" or "feathered edge," Horsburgh testified. (Tr. 106.) The Tincup stone "may vary from four inches in thickness in the middle, and then it feathers or knifes down to an inch or so." (Tr. 106.) While the outcrops shown in Exhibits 9, 12, and 13 manifest some perpendicular facings, the stone in Thompson's pallets, for the most part, does not, Horsburgh testified, leading him to conclude that the stone does not predictably split perpendicularly. (Tr. 428-33.) Horsburgh stated that "[t]he reason that that's so critical is because when masons put this stone on walls or in patios, they want a very flat surface, and it's very hard to do when you don't have consistently thick material." (Tr. 106.)

The only uncommon criterion that the Tincup stone meets, Horsburgh stated, is that it is hard and durable. (Tr. 108.)

Horsburgh contrasted stone that has been found to possess the qualities he concluded were lacking in the Tincup stone. The stone mined by Northern Stone Supply and Oakley Valley Stone near Oakley, Idaho, was the subject of much testimony at the hearing (see e.g., Tr. 116-39, 252-54, 276-78, 1000, 1008-09, 1025, 1031, 1033, Exs. 20-29, Ex. A), as the Department has issued patents for some of the mining claims located by these stone suppliers for uncommon building stone (Tr. 138, Ex. A). Exhibits 20 through 23 are photographs of "Oakley" stone mined from quarries owned by Northern Stone Supply. (Tr. 117-30.) Horsburgh testified that the "working face" of the stone being quarried in Exhibit 20 demonstrates a flat surface 15 feet by 40 feet in dimension. (Tr. 117-18.) While it contains fracturing, the

fractures are spaced so that the stone can be taken out in relatively large pieces, and the plates split out in parallel, thin sheets. (Tr. 118.) However, Oakley stone is often removed in thicker plates, then split down into thinner sheets. (Tr. 123-24.) The strike and dip of the beds allows them to be opened into large, flat surfaces that become working surfaces for removing the stone in layers. (Tr. 120.) Exhibit 23 shows Northern's stone on pallets. (Tr. 126.) It is "half-inch to three-quarter-inch planer, completely flat, consistently, with a consistent thickness of stone on the pallets," having dimensions "a third to a half of the size of a [four-by-four foot] pallet." (Tr. 127.)

Exhibits 24 through 28 are photographs of stone mined by Oakley Valley Stone. (Tr. 129-36.) Exhibits 24 and 25 demonstrate jagged, thin sheets of varied sizes, with perpendicular edges. Exhibits 26 through 28 depict palletized stone having consistently flat, planer surfaces, perpendicular edges, and thicknesses of 1-2 inches. (Tr. 132-35.) Horsburgh testified that the deposits owned by Northern Stone Supply and Oakley Valley consistently produce this quality of stone on a large scale. Id.

Exhibits 30-35 depict stone referred to as "Three Rivers Gemstone," (Clayton deposit) mined by L & W Stone near Clayton, Idaho. (Tr. 140-152.) Horsburgh testified that the Clayton deposit is distinguished by the presence of unique patterning, which resulted from mineral deposition between plates. (Tr. 145.) Only 20 to 25 percent of the stone removed can be split to less than 1 inch thick (Tr. 145), but the patterns are valued so highly that the thicker stone can still be marketed at a premium (Tr. 147-48.) However, an even thickness is consistently achieved (Tr. 149; Ex. 34), and their major market is for 2-inch or less material (Tr. 147). Exhibits 30 and 31 depict the working face of the Clayton deposit (Tr. 141-43), showing large faces of open stone that can be "pulled off" by the bucket of a track backhoe (Tr. 143-44).

Horsburgh also testified that all building stone that can be split into thin sheets may not be uncommon, as demonstrated by Exhibit 36, which is a photograph of palletized sheets of "Cherokee red" sandstone, which is mined near Park City, Utah. (Tr. 153.) While the stone is uniformly thin and large-plated, it is "fairly soft," breaking off when "you put it under foot," he stated. (Tr. 155.) Whether the stone could be considered uncommon under those circumstances would depend upon the price it commanded in the market. (Tr. 155-56.)

We will summarize Horsburgh's testimony regarding the marketability of the Tincup stone infra. For the moment, we turn to evidence Thompson introduced into the record pertaining to the characteristics of the deposit, beginning with area Q1.

2. Thompson's Testimony

a. Area Q1

Thompson identified Q1 as the main quarry. (Tr. 542.) He described the stone from the Q1 quarry as "splittable" and coming out in "uniform thicknesses." (Tr. 551.) As Judge Heffernan noted, "[t]his is obviously in stark contrast to Horsburgh's testimony." (Decision at 10.) Contestees introduced a number of photographs of the Q1 quarry area, including Exhibits D-1 through D-18 (Tr. 571-81; see also Tr. 552-67), and Exhibits E-1 through E-6 [13/] (Tr. 595-604). The photographs depict areas in the outcrop where Thompson has blasted rock (e.g., Exs. D-9, D-10, and D-11; see also Tr. 558), as well as the vertical span of the Q1 outcrop (e.g., Exs. D-5, D-10 through D-12).

Thompson testified that the rock in area Q1 is the most accessible. (Tr. 550.) According to Thompson, the rock in Q1 "dips at about a 10-20 degree angle into the mountain." (Tr. 562.) He has been blasting the stone out of area Q1 since 1976 or 1977. (Tr. 575.) He can produce thinner stone in larger pieces, such as the stone shown in Exhibit D-7, [14/] if he bars it out and splits it, instead of blasting it out, but "[i]t takes more time, more labor." (Tr. 560-62.) Thompson disagreed with Horsburgh's testimony that less than 10 percent of the the stone in Q1 is less than 4 inches thick. (Tr. 563.) Most of the stone barred out comes out in "two to three inch" thicknesses. (Tr. 559, 565.) Even if stone is manually removed from area Q1, it must be manually split to achieve thinner stone. (Tr. 560.) Even then, not all stones will split without fragmenting in the process. (Tr. 560-61.) Thompson testified that the stone exhibits a variety of colors. (Tr. 565.)

Exhibits F-1 through F-6 are representative of stone taken from the Q1 quarry. (Tr. 614-15.) Thompson testified that none of the stone shown in Exhibits F-1 through F-6 was split. (Tr. 614.) Exhibit F-6 depicts portions of three pallets of stone which are snow-covered on top and are partially covered from the bottom up, hiding some portion of their contents. Thompson testified that the pallets shown in F-6 are sitting on a trailer (Tr. 613), and he sorted them according to thickness (Tr. 613-14). According to Thompson, the pallet on the left, which is not clearly visible in the photograph, contains "smaller chunky rock," at the request of the buyer. Id. 613-14.

[13/] Thompson testified that Exs. D-17, E-2, and E-7 depict area Q1-A as well. These photographs are examined relative to area Q1-A infra.

[14/] Ex. D-7 shows a young boy balancing a stone, approximately a foot wide by 2 feet long, on his knee. The depth, or thickness, of the stone is not apparent in the photograph, although a similar stone at his feet appears to be greater than 1 inch thick.

The middle pallet, he testified, has thin stone that has been separated out. (Tr. 614.) That pallet contains one stone that appears to be about an inch thick (Thompson testified it is between ⅜ and 1¼ inches thick (id.)); the thicknesses of the rest of the stones in that pallet are not clearly discernible. The pallet in the foreground, Thompson testified, contains stone from 1 to 2¼ inches thick. Id. The one stone visible in that pallet appears to match this description; however, most of the stone in that pallet cannot be seen in the photograph. Exhibit F-5 shows a pallet containing some large, thin unevenly-edged stones of varying thicknesses, including one large stone in the foreground having an unquantified thickness, which nonetheless is not properly characterized as "thin." See also Exhibit F-14, which is an enlargement of F-5.

b. Areas Q1-A through Q9

Thompson testified at some length concerning the characteristics of the stone in areas other than the quarry at Q1. Contestees' Exhibit J is a compendium of seven photographs introduced by contestees depicting various outcroppings on the claims in the other areas. We summarize relevant evidence below.

Area Q1-A. The rock in Q1-A was described by Thompson as the same stone as in Q1, "but more blocky." [15/] (Tr. 545-46.) While Thompson testified that area Q1-A is visible in several photographs he authenticated, a visual depiction of the Q1-A exposure is elusive, at best. Thompson testified that Exhibit E-2 shows a caterpillar that roughly divides foreground and background in the picture of Q1-A. (Tr. 601-04). However, the area to the rear of the caterpillar is proximate to what could be termed the "vanishing point" of the photograph, or the point at which the outcrop recedes into the horizon, and therefore does not depict an exposure with any detail. According to Thompson, area Q1-A, after it rounds the bend in the access road, is shown in Exhibit E-7 (Tr. 601-02), which likewise does not depict an outcrop with any detail. Photograph E-7 primarily shows the access road and the hill above it in the full bloom of spring or summer vegetation, with only a small ledge of rock visible, and without sufficient detail to establish the character of the exposure. Thompson further testified that area Q1-A is depicted in Exhibit D-17, but only the top of the formation is exposed, as "we haven't dug it down." (Tr. 579-80.) Thompson testified that Exhibit D-17 shows area Q1, moving up the road to the east, into area Q1-A. (Tr. 580.) Exhibit D-17 shows, to the left of center in the photograph, a barely exposed outcrop demonstrating diagonally bedded rock covered over to some extent with rubble and overburden, which moving east gradually succumbs to overburden.

[15/] Thompson refers to area "Q-A" (which is not an area labeled on Ex. C) at Tr. 546; however, from the context, it is clear that he is referring to the main quarry at Q1.

Areas Q2 and Q3. Thompson testified he has taken "a layer of stone" out of area Q2 (Tr. 542), and described the stone removed as "surface stone" (Tr. 543), but provided no photographs depicting the outcrop at Q2. Nor did he offer definitive photographs or testimony about the outcropping at area Q3.

Area Q4. Exhibit J-2 shows, in the foreground, area Q5, and, in the background, the outcroppings at Q4 (Tr. 710-11) at some distance, and in shadow. Thompson has removed "breccia" from area Q4 (Tr. 543-44), which, he testified, forms when "heat melts the rock within the rock, so you'll have various rocks within a rock" (Tr. 544, 713.) However, area Q4 is not sufficiently visible in Exhibit J-2 to establish that the quality of the stone in Q4 has any of the uncommon characteristics described by Horsburgh. Nor does photograph J-7, which also shows the outcrops at Q4 at a distance, help us reach that conclusion. See Tr. 723-27.

Area Q5. The foreground area in Ex. J-2, which Thompson testified exhibits the same characteristics that are found in area Q1 (Tr. 711-12), demonstrates no bedding planes nor any other characteristics similar to those found in area Q1. The rock at Q5, he testified, has not been developed "heavy," but is splittable. (Tr. 545-46.) According to Thompson, Exhibit 3 depicts the outcropping on the Montana side of Q-5, but not within claim boundaries. (Tr. 719-22.) Thompson testified that Exhibit I-7 also depicts the outcrop at Q5. (Tr. 693-94.) However, the outcrop shown in I-7 is partially covered with snow, and the photograph reveals no bedding planes or other similarities to the quartzite exposed at Q1.

Areas Q6 and Q7. Thompson testified that Exhibit J-1 depicts, in the center foreground, a ledge area at Q6, and area Q7 in the front foreground. (Tr. 708-09.) From the photograph, area Q6 appears to comprise uneven, thick, fractured bedded layers of stone which dip at an angle into the slope. The Q7 stone in the foreground, however, is partially covered in vegetation, and where visible, shows no discernible signs of bedding. Thompson testified that he has removed "fire quartz" from area Q6. (Tr. 545.) "Fire quartz" is a "blocky stone," shaped like a brick (Tr. 545), as shown in Exhibits J-3 (Tr. 713, 715) and J-4 (Tr. 715-16). The outcrops depicted in Exhibits J-3 and J-4 portray blocks of stone of various sizes and shapes that do not exhibit discernible bedding. Thompson testified that the stone shown in J-4 is "eight to ten inches thick," "comes out" in "variable size" and "chunks," and is "sometimes splittable." (Tr. 716-17.) Photograph J-5 shows a location between areas Q6 and Q7 (Tr. 717-18), and portrays an outcropping of lichen-covered quartzite (Tr. 718) that contains no apparent horizontal bedding planes, but exposes thick vertical beds that do not visibly demonstrate the planer surfaces described by Horsburgh as integral to uncommon variety stone.

Areas Q8 and Q9. Thompson testified that the stone in Q8 is "a little like Q6, but this stone is also in the form of * * * a brick or a column-type stone." (Tr. 547.) He sold some of the stone in Q8 to a company doing business "in Jackson." Id. The stone in Q9 is "same [sic] kind of a granite. It's bluish and comes out like it's poured." Id. Thompson testified that he hasn't sold much stone from Q9. Id. Contestees did not introduce into evidence photographs depicting areas Q8 and Q9.

c. Palleted stone

Exhibit F contains 19 photographs, 15 of which represent Thompson's palleted stone. Only Exhibits F-1 through F-6 were identified by the area from which they were removed. See discussion under Area Q1, supra. The photographs in Exhibit F were taken at different time periods between 1982 and 2001. [16/] Exhibits F-1 through F-6, and F-11 through F-14 were taken during December 2001 by Thompson's attorney. (Tr. 605, 606, 609.)

The photographs of palleted stone were generally used to discuss thickness, splittability, and how Thompson sorts the stone. (Tr. 611-19.) Thompson testified

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[16/] Thompson authenticated a number of photographs, very few of which bore a date. Thompson testified as to the approximate date each picture was taken; however, in some instances, his testimony, complicated by Judge Heffernan's participation, was baffling. For example, concerning the dates when Ex.'s D-9 and D-10 were taken, the transcript reads:

"The Court: Mr. Thompson, do you have any recollection of when these two photos might have been taken?"

* * * * * * * *

"The Witness: I'd guess maybe the mid-'80s; maybe the mid-'90s. Just a guess."

"The Court: Nineteen eighty-five? Go for the 1985. This sounds kind of like 'Going once, going twice.'"

"The Witness: I guess that's about right."

"The Court: We can do this by a show of hands. Nineteen eighty-five for D-9 and D-10." (Tr. 576-77.)

See also, e.g., Tr. 607, where Thompson testified that Ex. F-7 could have been photographed in the "mid-'90's or early '90's, probably mid-'90's, maybe even late '90's." In answer to Judge Heffernan's question, "Shall we compromise and call F-7 1989," Thompson answered "That would be fine." When Sebby again asked, with reference to Ex. F-7, "And what date?" Thompson testified, "That would probably be '81, '82." From these examples and others (see e.g., Tr. 691-92), it is clear that, unless the photographs were dated contemporaneously, Thompson had no recollection, within a 10-year period, of when many of them were taken.

that the thick stone shown in the pallet in F-13 is about "three to four inches thick" (Tr. 617), but surmised that it could be split down to a 2-inch piece and, with continued prompting from his attorney, said it "cracks parallel to the bedding face," and would split "about inch, inch and a-half" (Tr. 618). Exhibit F-19 also depicts palleted rock more than 2 inches in thickness.

Exhibits F-8 and F-9 show pallets of rock having varying thicknesses, where thickness is visible at all. Thompson testified that photographs F-8 and F-9 were "pictures of the stone in the quarry's stone yard" (Tr. 607) taken by Thompson's brother (Tr. 608). Later on, his attorney clarified that the stone depicted in Exhibits F-8 and F-9 was "stone at Squire's yard" in Rexburg. (Tr. 616.) Thompson testified that the rock in those pallets "looks like some of the maybe waste stuff, or should have been maybe split down."

Although his testimony is equivocal on the point (see generally Tr. 851-75), Thompson testified that he does not sort the stone strictly by thickness or uniform size (Tr. 854, 857-60), but includes a variety of sizes and thicknesses in each pallet (Tr. 629-30, 852-53). The stone is irregular, so he pallets variety. (Tr. 855.) The photographs in Exhibit F support the conclusion that Thompson does not sort the stone by uniform size and thickness.

3. Cockrum's Analysis

Cockrum authenticated Exhibits AA through FF, which are photographs depicting various common variety quartzite outcroppings. (Tr. 1116-44.) None of the outcrops shown in Exhibits AA through FF were being mined for building stone, with the possible exception of that shown in Ex. DD-1. See Tr. 1128-30. Cockrum testified that the pallets shown in Ex. DD-2 were located about 1,000 feet from the outcrop shown in Ex. DD-1 (Tr. 1127-28), and demonstrated rock with a "blocky" appearance, with "small pieces, nothing flat, nothing large," indicating both vertical and horizontal fracturing in the outcrop (Tr. 1128-29). According to Cockrum, that type of stone is widespread in the region, "exposed extensively" from "Challis to Salmon, and then south to Mackay." (Tr. 1130.)

Cockrum testified that he visited the Tincup claims on January 13, 2001, when there was "roughly two to five feet" of snow in the area. (Tr. 1144.) Using a snow-mobile to navigate, he testified that he was "able to look at many of the exposed outcrops" shown on contestees' Exhibit C, but he acknowledged that, to some degree, the visibility of the outcroppings was hindered:

We were able to view the outcropping and the mine face of Quarry 1.

We went up to the top next, and we looked at rock along the top of [the] ridge in quarry Q6 and in Q5. And in the Q4/Q3 areas we were able to look at rock[.] In Quarry Q6, I took a few rocks out.

* * * * * * * *

The rock was in outcrop there because the * * * wind blows enough on top of the ridge so that the snow blows off. We took a look at the rock that was exposed there.

During that examination I pulled out Rock GG-1 to take a look at the color of the rock, * * * the texture * * * and some of the other properties * * *. I took a rock similar in size to GG-1 from * * * Q6, * * * and I hit it.

You can see GG-2. In the upper part of GG-2 you can see where my hammer mark is.

And what I did was use a three-pound sledge hammer. I hit it one time and broke a face to see what a freshly broken face would look like.

And [Ex. GG-2] * * * depicts what it was that I split out of there. * * *

We went up to Q5 and took a look at the exposed outcrops there. Mr. Thompson directed me to an area off the side of a cornice of snow where a large volume of stone had been removed * * * [,] which is in the state of Montana just barely, and we looked at the rock in that general area.

We next went up into the Q4/Q3 area along where you can see a large outcrop that's exposed for approximately, I would say, 300 feet. And we took a look up there at the natural outcrop.

What we took a look at there was: What is the natural fracture spacing in the rock where no workings had been completed, no blasting?

* * * * * * * *

> Then we moved across the Q1-A area which Mr. Thompson refers to as the splittable stone deposit that roughly starts in Q1, is continuous along the Q1-A-1 [sic] area, and ends up in Q5. And it's continuously exposed in outcrop, or in workings along a vein length of about 1,300 feet.
>
> Q. Were you able to observe forces of that same formation of stone along that entire length between Q1 and * * * Q5?
>
> A. Pretty much. There were areas that were too deep in snow in between, between – I don't know exactly. Let's say the upper third of Q1-A.
>
> And in the lower 300 feet of Q1-A there was too much snow to view the rock in outcrop.
>
> Q. Well, were you able to view outcrop of rock in the area of * * * Q5 and the upper portion of Q1-A?
>
> A. Yes.
>
> Q. Were you able to determine whether it was essentially of the same formation as exposed in Q1?
>
> A. Yes, essentially that is the same rock exposed along the strike.
>
> Q. Would that allow you to infer that the deposit extends throughout the entire distance?
>
> A. Yes, I think that would be a fair deduction to make.

(Tr. 1144-49 (redundant phrasing omitted).)

Cockrum testified concerning what he found unique about the stone in the "Q1/Q5" [17/] outcropping using contestees' Exhibit D-1, which is a photograph taken by Thompson several years prior to Cockrum's January 2001 visit. See Tr. 571-72. The quartzite is "fairly thin-bedded," parting or splitting in thicknesses "between three-quarters of an inch to roughly four inches," Cockrum stated, "with the majority of it being in * * * the one-inch to two-inch thickness." (Tr. 1151.) He testified that the bedding shown in D-1 has "continuity," or "positional layering, so that the rock is

[17/] This nomenclature was supplied by the attorney questioning Cockrum. (Tr. 1150.)

unique in that it can provide material that can be split into thin plates that will be large in size and will provide a color that is unique to everything else in the area." Id.

Illustrating with Exhibit HH, which is a rock sample from Q1, Cockrum testified that the rock is a micaceous quartzite that is not flat, but wavy in appearance (Tr. 1152), with the "micaceous layers segregated from more quartz-rich layers" (Tr. 1153). According to Cockrum, Exhibit HH broke out of the outcrop in "about a two-inch thickness," but could be "split down to an eighth-of-an-inch, quarter-of-an-inch plates if you decided that you wanted to do it." Id. He continued:

> [A]nd by breaking out it displays something that makes this rock unique. When we look at either this surface or the split-out surface that produces the two rocks that are an inch in thickness, the folding and the compositional layering, when split and when naturally parted along the remnant bedding planes, produces a natural textured surface, and this textured surface is a unique quality that makes this rock uncommon in terms of comparison to the quartzite that we just viewed * * *. [18/]

Id. Exhibit HH, he testified, could be split into parallel thicknesses. (Tr. 1159-60.) His opinion was that the quartzite found in areas Q1, Q1-A, and Q5 are equally splittable, and that splitting into wavy surfaces is actually a unique quality of the rock, rather than a common property. (Tr. 1159.)

Cockrum estimated the mica content of the stone to be 10-15 percent. 19/ (Tr. 1160.) He stated that the quartzite was weakly foliated 20/ in some places, "a little more strongly foliated in others." (Tr. 1156.) For example, Exhibit HH is more strongly foliated than Exhibit GG-1. (Tr. 1156-57.) Because of its micaceous quality, which has permitted water to flow through the layers, the rock is multicolored, as

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18/ Cockrum is referring here to photographs of quartzite outcroppings which he testified depict common variety quartzite deposits. See, e.g., Exs. AA through FF.

19/ Cockrum testified that he would not define the micaceous quartzite as a "schist" (Tr. 1160) (although Thompson's response to BLM's February 1997 request for information represents the Tincup stone as a "quartz schist with mica sheets") (Ex. 3 at unnumbered 6). Cockrum apparently identifies schist with higher micaceous quality and lower desirability as a building stone. (Tr. 1124-26, 1160.) However, schists may be marketable for building stone. See United States v. Dunbar Stone Co., 56 IBLA at 63-64.

20/ Cockrum defined "foliation" as it is applied in the stone industry as a property of stone that produces "a parting or cleavable surface, * * * something that can be split." (Tr. 1157.)

illustrated by the rocks GG-1 and GG-2, Cockrum testified. (Tr. 1153-54.) Both the color and the texture of the Tincup rock make it unique, according to Cockrum. (Tr. 1154-55.)

Cockrum testified that the only way to know whether the mica layers were not parallel to the bedding stone is to look at a thin section of rock "under microscope under 100-power magnification to get an idea of whether * * * the sedimentary bedding is parallel to the schistocity." (Tr. 1161.) However, he did not testify that he had performed such a test.

Cockrum stated that the fracturing at Q1 was the result of weathering and blasting. (Tr. 1162-68.) All quartz deposits, even the Oakley deposits, are fractured at the surface, he testified, due to weathering. (Tr. 1163-64.) The vertical fracturing should therefore decrease as the miner moves deeper into the deposit. (Tr. 1165.) Cockrum testified that fracturing caused by tectonic effects would be "parallel and of roughly uniform spacing throughout." (Tr. 1167.) Fracturing was further compounded in portions of Q1 where Thompson had blasted the rock. (Tr. 1166-67.)

Cockrum summarized by stating the following: (1) The stone in areas Q1, Q1-A, Q4, and Q5 is splittable into parallel plates with perpendicular edges with a thickness of 1 to 2 inches, and thinner. (Tr. 1168-69.) He opined that 60 to 80 percent of the stone in areas Q1, Q1-A, and Q5 "naturally breaks out into a thickness of between one and two inches" depending on the effort. (Tr. 1181-82.) (2) Larger pieces of stone are available in the Q1, Q1-A, Q5, and Q6 areas, and the fracture patterning of the outcrop would not prevent the removal of the larger pieces. (Tr. 1170-71.) In any event, stone masons do not like larger pieces, he stated, because in spite of their thinness, they are heavy and difficult to handle. (Tr. 1172-73.) Masons like stone in the "eight-inch by eight-inch to 12-inch by 12-inch category, an inch to two inches thick," he testified. (Tr. 1173.) (3) Photographs submitted by contestees demonstrate that the edges "break fairly close to perpendicular," and those that do not can be broken off. (Tr. 1174.) That there are no other quartzite quarries in the immediate vicinity leads him to believe the stone is rare. (Tr. 1178-79.) He believes the stone to be unique in terms of color and texture. (Tr. 1187.) "More than anything else," he stated, "the small folds in the rock" that produce "that textured appearance" render the stone unique. Id. Cockrum is aware of "no other quartzites * * * that could be exploited for that property on an economic basis." (Tr. 1188.)

Cockrum offered no testimony concerning areas Q7 - Q9; we therefore infer that those outcroppings were either snow-covered, or otherwise failed to impress him.

C. Marketability

1. Horsburgh's Analysis

Horsburgh structured his market analysis based upon "[w]hat Thompson said his mining claims were located for" in his patent application and follow-up correspondence. (Tr. 203, see also 359-60.) Supplemental information filed with Thompson's patent application on June 2, 1992, states: "The Tincup Stone is sold in a variety of sizes, thickness[es] and colors. The stone surface dimensions size ranges from several inches to over five feet lengths. The stone thickness ranges from one-quarter- to ten inches thick with an average thickness of two inches." In a February 1997 letter to Thompson, Horsburgh informed Thompson that the Tincup stone would be compared with other building stones produced in the area, including "Oakley Quartzite, Three Rivers Quartzite, Desert Antique (rhyolite), and vesicular basalt." (Ex. 2 at 2; see also Tr. 443, 437-48, Ex. 4 at 21-23.) Thompson's response to BLM's February 1997 request for information represents the Tincup stone as a "quartz schist with mica sheets that has been uplifted and foliated," producing "slabs [that] tend to separate along the foliation as rock cleavage varying from 1/4" to 5" in thickness." (Ex. 3 at unnumbered 6; Tr. 359-60.)

Quartzites that are "very blocky and not capable of producing building stones," were not included in the market survey, because the Tincup claims are located for building stone, Horsburgh stated. (Tr. 203.) The market comparison was limited to those deposits that produce common and uncommon "platy" stone, such as rhyolite and limestone, because that is the type of stone Thompson produces. (Tr. 203-04.) Thus, massive quartzite deposits were excluded from the survey because they are not mineable as building stone. (Tr. 210.) However, "platy" common variety stone was included. (Tr. 215-222.)

Horsburgh surveyed natural building stone mined and sold by producers located in Idaho, Wyoming, Utah, Colorado, and Arizona. (Ex. 4 at Figure 7, Tables 1-4, and Appendix (App.) 1.) [21/] He obtained freight-on-board (FOB) quarry prices per ton for

[21/] Horsburgh surveyed 10 stone producers mining building stone at 16 locations. We have not summarized all of the data he collected as the result of his market survey, but have limited our discussion to several representative samples.

Contestees argue that Horsburgh's survey of stone producers was hearsay evidence, and should be disregarded. (Contestees' Response at 25.) The Administrative Procedure Act (APA) provides, in pertinent part, that "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."

(continued...)

stone products sold, as well as mining costs per ton for each product. (Ex. 4 at Tables 1-4, App. 4.) He surveyed products sold by type and thickness. Id. It is clear from the data he collected that, in the facing stone market, stone is graded by thickness: the thinner the product, the higher the price per ton the stone commands. Id.

Horsburgh surveyed a range of facing stones. See Ex. 4, App. 1. He surveyed the Oakley, Idaho, quartzite deposits mined by Oakley Valley Stone (see Ex. 4, App. 1 at Record #97-01) and Northern Stone Supply (see Ex. 4, App. 1 at Record #97-02) because the Tincup deposit, as it has been represented by Thompson, is in direct competition with those deposits. (Tr. 198.) As of February 19, 1997, less than ¾-inch stone covering 250 square feet (sf.) per ton commanded $165 per ton, whereas Oakley Valley's 2-inch "quartzite stepping stone" covering 60 sf. per ton sold for $95 per ton, and its 4-inch "Dry Stack" (no coverage data) commanded $75 per ton. (Ex. 4, App. 1 at #97-01.) Oakley Valley's quartzite maxi blocks, which are large pieces of ledge stone with dimensions of 12 inches x 12 inches x 24 inches, covering 15 to 20 sf. per ton, commanded $75 per ton. Horsburgh did not collect data from Northern Stone Supply on quartzite over 2 inches thick, but his survey included 1½- to 2-inch quartzite stepping stone, which sold for $75 per ton. (Ex. 4, App. 1 at #97-02.) Northern Stone Supply's 1-inch to 2-inch platy rhyolite brought $120 per ton, whereas its 2- to 4-inch rhyolite sold for $78 per ton. (Ex. 4, App. 1 at #97-03. [22/])

Horsburgh also surveyed operations which produce only common variety building stone. Junior Lewis produces platy rhyolite under a materials sales contract

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[21/] (...continued)
5 U.S.C. § 556(d) (2000). Hearsay evidence is not inadmissible per se. Bennett v. National Transportation Safety Board, 66 F.3d 1130 (10th Cir. 1995). Hearsay evidence that meets the standard of section 556(d) of the APA can be weighed in agency proceedings according to its truthfulness, reasonableness, and credibility. Veg-Mix, Inc. v. U.S. Department of Agriculture, 832 F.2d 601 (D.C. Cir. 1987). Market surveys of this type are routinely conducted as part of BLM mineral validity examinations. See, e.g., contestees' Ex. A, "Mineral Report" for Northern Stone Supply, Inc.'s Mineral Patent Application for the Oakley quartzite deposit, at 59-63. Appellant cross-examined Horsburgh at length concerning his findings and conclusions (Tr. 173-510), including the market survey. See, e.g., Tr. at 198-221, 300-301, 346-52, 354-67, 386-95, 438-46. Accordingly, we consider the weight attributed to the testimony pertaining to the building stone market. See David Q. Tognoni, 138 IBLA 308, 319 n.5 (1997).

[22/] A resurvey of Northern's rhyolite price list on Mar. 12, 1997, revealed that Northern began selling all rhyolite 4 inches thick or less at $110 per ton. See Ex. 4, App. 1 at #97-14.

with BLM. (Ex. 4, App. 1 at #97-08.) He picks the stone and hauls and pallets it himself, and sells it FOB quarry for $80 per ton. Id. Also under a materials sales contract, Quincy Adams produces platy limestone, or moss rock, from talus slopes. (Ex. 4, App. 1 at #97-09.) According to Horsburgh's survey, "[n]o rock is quarried, and nothing bigger than 4 inches is picked." Id. He sells 1-inch to 4-inch limestone for $160 per ton; his $80 per ton mining costs include transportation to his stone yard, and a $16 per ton in-place royalty paid to BLM. Id. S & S Stone, located in Boise, reported that it received $70 per ton for its "Desert Antique," a 1- to 1½-inch thick platy rhyolite mined near Marsing, Idaho; the 2- to 4-inch platy rhyolite brought $60 per ton FOB quarry. (Ex. 4, App. 1 at #97-10.)

Survey results were classified by type of building stone sold and price per ton from highest to lowest, and recorded on Tables 1 through 4 of the Mineral Report. Table 1 pertains only to micaceous quartzite producers; Table 2 catalogues data pertaining to platy rhyolite; Table 3 lists market data for platy sandstone, limestone, and dolomite producers; and Table 4 records quartzitic sandstone market data. Each of the tables lists the product by price per ton, according to thickness. The unavoidable conclusion is that, other than for large plates of stone used for table tops (e.g., as shown in Table 4), thinner stone products command a higher price per ton. See Ex. 4 at 16, 17.

Horsburgh showed samples of the Tincup stone to owners of stone yards in Idaho Falls, Rexburg, and Boise, Idaho, and in Murray, Utah, and questioned them concerning their opinions of its value. (Ex. 4 at 17.) [23/] The owner of the yard in Boise opined that the stone was marketable, but would not command as high a price as thinner stones. Id. The Idaho Falls merchant stated that he had attempted to sell some of the Tincup stone, but had returned it to Thompson when it failed to sell. Id. He believed the stone could be used as "stack rock," but not as facing stone, due to knify edges. Id. The stone yard in Rexburg sold the Tincup stone as stack rock. (Ex. 4 at 18.) The Utah merchant said the color was comparable to other stones on the market, but knify edges would prevent it from being used as a facing rock. Id.

In February 1997, Horsburgh requested information from Thompson concerning figures of total production from the claims since 1968 broken down by year, the prices he received for the stone, including "invoices or sales data that lists the price the stone sold for and is currently selling for," as well as mining and transportation costs. (Ex. 2 at 1; see also Tr. 163-65.) Thompson reported sales information to BLM in Ex. 3, summarized by Horsburgh in his Mineral Report, which we quote:

[23/] Horsburgh testified about his interviews with these four stone producers at Tr. 161-63.

Mr. Thompson stated that between 1968 and 1996, approximately 2050 tons of stone had been removed from the claims. Based on that total production figure, an average of 70 tons per year would have been removed. Mr. Thompson stated that 4 tons of palleted stone remain on the mill site claims and that 100 tons were stockpiled at Thornton, Idaho.

According to the September 1997 data provided by Mr. Thompson, between 1968 and 1975 the Tincup Stone sold for $50-90 per ton, between 1976 and 1989 it sold for $75-225 per ton, and between 1990-1996 it sold for $175-550 per ton. Mr. Thompson also provided a 1997 price list which included the following prices:

Size	Wholesale Price/Ton	Retail Price/Ton
Rubble	$175	$350
Large (6-8" thick)	$250	$500
Med[.] (3-5" thick)	$225	$450
Small (2-4" thick)	$275	$550
Thin (less than 1")	$325	$650

The author was unable to confirm the above costs because Tincup Stone is not being sold to any of the stone yards in southern Idaho or northern Utah and because Mr. Thompson only provided sales receipts for 10 tons of the 2050 tons of stone that he stated had been produced from the claims. One receipt, dated November 15, 1984, shows that Mr. Thompson delivered 5.5 tons of stone for $1155, or $210/ton. A second receipt dated August 12, 1982 showed that Mr. Thompson traded 4 tons of stone at $145/ton and ½ ton of stone at $165/ton. The statement also showed a delivery cost of $25/ton. Mr. Thompson also submitted a copy of a check dated May 21, 1990 which showed that he had been paid $125 for ½ ton of stone that had been sold in Rigby, Idaho. Mr. Thompson stated that some of the records on sales had been destroyed in the floods that occurred in the spring of 1997. Mr. Thompson also stated that it was common practice for him to trade building stone rather than sell it. He stated that he has traded for landscaping materials as well as pictures that had been painted.

* * * * * * *

> Mr. Thompson stated in his September 16, 1997 submittal that his current labor costs for palleting the stone at the mill site are $25/ton and his transportation costs to deliver the stone to the Idaho Falls area are $15/ton. He did not state what his costs per ton were to mine the stone and transport it to the mill site claims.
>
> Based on the market survey * * * conducted by the author, mining costs of other producers ranged from a low of $40/ton to a high of $100/ton, with the average of $65/ton. In the other operations that were surveyed, some of the stone is split and all of the stone is sorted before it is placed on pallets. Mr. Thompson hires hispanic laborers who do very little sorting. They remove the stone from the outcrop and load it onto a trailer and transport it to the mill site claims where it is placed on pallets. Because there is no splitting or sorting, the author estimated that the mining costs for producing Tincup Stone would be approximately half of the average of the other operators who were surveyed, or $35/ton.
>
> If the $75 cost for mining, palleting, and transportation are subtracted from the wholesale prices provided, Mr. Thompson's perceived value of the Tincup Stone at the quarry would be $100/ton for rubble rock, $175/ton for 6-8 inch thick stone, $150/ton for 3-5 inch thick stone, $200/ton for 2-4 inch thick stone, and $250/ton for less than 1 inch thick stone.

(Ex. 4 at 8-10; see also Tr. 161-68, 365-67, 379-80, 496.)

With regard to the quantity of stone removed from the claims between 1994 and September 1997, the Mineral Report stated that Thompson reported that he had removed 82 tons of stone between 1994 and 1997, and that, at the end of the 1996 season, 104 tons of palleted stone were stockpiled at either his stone yard in Thornton or at the mill sites. (Ex. 4 at 18; see also Tr. 164-68; Ex. 3 at unnumbered 4-5.) In May 1997, Horsburgh confirmed that there were 70 pallets located at Thornton. He accounted for the 100-ton stockpile by estimating that each pallet weighed 1½ tons. (Ex. 4 at 18; Tr. 509.) In August 1996, Horsburgh counted 18 pallets stockpiled at the mill site, calculating, at 1-1½ tons per pallet, a total of 18-25 tons there. (Ex. 4 at 18.) While the Mineral Report concluded that Thompson had sold "little or no stone since 1993" (Ex. 4 at 18), Horsburgh testified that it was possible, given production figures submitted by Thompson in September 1997, that the stockpiled stone had accrued prior to 1994, and that Thompson had sold 82 tons of stone since 1993 (Tr. 508-11).

Although Thompson sells stone from the Tincup claims, Horsburgh concluded that the Tincup stone can not compete in either the local or regional market with other

building stones that have been sorted into pallets of consistently thin, platy stone. See Tr. 434-39, 513. He testified that he did not observe any facing stone at any of the stone yards he toured that was similar to the Tincup stone. (Tr. 512-13.) He commented that "most stone yards have pallets of two-to-four-inch stone that is obviously a common variety if it would come off federal land, but they also have a category they call 'rubble rock,'" which would encompass the Tincup stone. (Tr. 513.)

2. Contestees' Testimony Pertaining to Marketing

a. Thompson's Testimony

Thompson has been a consulting engineer for 30 years. (Tr. 530.) Because of his consulting business, he works the claims on vacation, holidays, and weekends, during July, August, and September. (Tr. 556.) The Tincup claims were originally located by Thompson's father, who worked the claims during the summer, but also had an interest in a "bulk plant," and delivered heating fuel during the winter months. (Tr. 850-51.) Thompson worked on the Tincup claims as a youth (Tr. 531-32), and began working the claims for himself in 1977, after his father's death (Tr. 534). Thompson's father "barred chunks of stone" from Q1 (Tr. 551, 552), and split the majority of stone sold by hand down to 1 inch to 2½ inches in width (Tr. 536).

Mining Costs. Thompson endeavors to control the costs of mining by eliminating those aspects of the work that are time and labor intensive. He testified that, even though he can extract bigger pieces if he bars the stone out, and thinner pieces if he splits the stone down (Tr. 560), that takes more time and labor, so he blasts it out. (Tr. 556-57, 575.) The stone blasts out "30 to 50 tons at a time," in various sized pieces, with "very little labor involved." (Tr. 557.) Alternatively, he may use a front-end loader with a swinging bucket to "pull" the rock out and load it. (Tr. 639.) However, he testified that "everything that I produce has been shot out with the blasting with PER-L" and a "couple of sticks of dynamite," even though that method causes the stone to fracture. (Tr. 658-59.) He loads the stone with a front-end loader onto a truck and hauls it to the mill site, where he either transfers it to a trailer for bulk sale, or sorts it into pallets. (Tr. 557-58, 639.)

If he sorts the stone, he may hand load it onto a trailer and haul it to the mill site for palleting, or he pallets at the mine. (Tr. 558.) He sorts out the small pieces "anywhere from a quarter inch to an inch," at the site, because "it breaks up" if he handles it, because the thinner stone is "more fragile." (Tr. 559.) Thompson testified that he had not hired anyone to pallet the stone in "six or seven years." Id. When he did hire laborers, he paid them $10 per pallet at the mill site. (Tr. 631.) He stated that, excluding palleting, he estimated his mining cost to be $15 per ton for removing the stone and hauling it to the mill site. (Tr. 634.) However, he also

testified that the mining cost for a bulk sale (at the time of the hearing) was $5 to $6 per ton. (Tr. 640.)

Thompson markets the Tincup stone through word of mouth. (Tr. 650, 652.) He testified that he only wants to sell what he can "get out" per season, which is between 25 and 40 tons, because he has "a business to run," and "do[es] this on weekends." (Tr. 651.) Additionally, he would "have to hire people up there [who] don't know how to split," and they wouldn't "do it right." (Tr. 652.)

Thompson produced virtually no records documenting his mining costs on an ongoing basis, [24/] nor did he provide evidence of the cost of mechanical equipment and its maintenance, or how that factored into his cost analysis. He produced no record, for any time period, of what portion of his revenue resulted from bulk sales, and what portion resulted from sales of palleted rock.

Receipts. Thompson provided ample evidence that he has sold stone from the Tincup claims for a variety of uses for which common building stone is ordinarily used. See generally, Exs. G, K, R. However, he has provided only 12 receipts documenting income from stone sales from 1977, when he took over the claims, to January 2002, when the hearing was held. See Exs. L and M. In his September 1997 response to Horsburgh's earlier request for invoices or sales data, Thompson stated they were destroyed in a flood that spring. (Letter from Thompson to Horsburgh dated Sept. 12, 1997.) At the hearing, he testified that he could not account for documents that were "misplaced, lost, or whatever," so the documents in Exhibit L are not a record of every sale he has made. (Tr. 757-58.) However, whether they were lost in a flood or a divorce, the fact remains that Thompson produced few receipts for sales of stone that were contemporaneous with the sale. [25/] Data collected in the receipts set forth in Exhibits L and M are set forth in the table below:

[24/] The one exception is Ex. L-8, where the charge for palleting was recorded as $25.00 per half-ton. See initial entry for Ex. L-8, in the table below.

[25/] Judge Heffernan correctly did not consider Thompson's testimony concerning price per ton in connection with each of the sales represented in contestees' Exhibit R, as there was no contemporaneous documentation to support Thompson's verbal testimony concerning those sales.

Date of Receipt	Ex. No.	Volume Sold	Amount Received	Price/Ton
8/12/82	Ex. L-8	4 tons ½ ton delivery cost "cost for handling ½ ton"	Retail trade Retail trade Cash Cash	$145 $165 $112.50 $25.00
9/15/82	Ex. L-9	4 tons	(no data) [26/]	Trade Exchange
11/15/84	Ex. L-7	5.5 tons	$1155	$210
Summer/89	Ex. L-1-b	12 tons		$225
5/21/90	Ex. L-6		$125	
7/1/96	Ex. L-5	1 ton		$175
8/99	Ex. L-4	40.5 tons	$14,175.00	$350
4/20/01	Ex. L-2	1 ton ½ ton		$300 $150
7/3/01	Ex. L-1-a	2¼ tons	$337.50	$150
7/14/01	Ex. M-2	100 (buyer assumed all costs)	$10,000	$100
7/16/01: 2000 1973	Ex. L-3	 5 2	 $1125 $120	 $225 $60
1990-2001		200 tons		$200-250 (cash sale) $300 (barter) [27/]

[26/] Thompson testified that he traded stone multiple times through the Trade Exchange, where products were exchanged based on retail value. (Tr. 783.)

[27/] Four of the buyers for which Thompson provided sales receipts were located in Idaho Falls; two were located in St. Anthony, Idaho, and one each was located in the following Idaho cities, towns, or counties: Rexburg, Rigby, Pocatello, Iona, Delco, and southern Madison County south of Rexburg. These locations are well within

(continued...)

b. Other Testimony on Behalf of Contestees Pertaining to Marketability

Galust Berberian, an artist living in Madison County, Idaho, testified that, since 1990, he has bought approximately 200 tons of stone from Thompson for a number of outdoor uses. (Tr. 905-06, 910.) He testified that he paid $250 per ton unless the stone was bartered for art, when it was valued at $300 per ton. (Tr. 907, but see Tr. 754-56 where, referring to Berberian, Thompson testified that he sold the artist stone from 1990 to 2001 for "$200-250 per ton.") These figures have been added at the bottom of the table above.

David Rodriguez is the son of the owner of the Rock Garden Quarry mining claims, which were located for uncommon building stone on Middle Mountain near the Oakley quarries (Tr. 1000-01) and were, at the time of the hearing, the subject of a pending patent application with BLM [28/] (Tr. 1107). Rodriguez identifies himself as a prospector who "enjoy[s] working with stone" (Tr. 1108-09), and is interested in a future business relationship with Thompson (Tr. 1107). While working as a manager for his father's quarry lessee, Snake River Quartzite, Rodriguez sold landscaping stone direct to garden center retailers, and did not market stone from the Rock Garden quarry as a masonry product. (Tr. 1000, 1009-13.)

Rodriguez compiled a spreadsheet (Exhibit W) setting forth hypothetical costs for extracting the Tincup stone using an excavator and custom operator to remove stone at a rate of 72 tons per day seasonally. (Tr. 1070-71; see generally 1068-83.) Rodriguez opined that eliminating blasting by removing stone with an excavator would prevent fracturing during extraction. (Tr. 1042-43.) Itemizing the costs of extraction, Rodriguez hypothesized that, assuming a 40-percent waste factor, he could produce a ton of stone for a cost of approximately $52.40 per ton for 1-inch stone, $47.40 for 1½-inch stone, and $32.40 for 2-inch stone. (Tr. 1079-82, Ex. W.) Using a 1999 price list he developed while working for Snake River (Tr. 1084, Ex. X), Rodriguez testified that the stone would be profitable assuming the hypothetical mining costs he calculated on Exhibit W (Tr. 1094-95). Rodriguez had not visited the deposit at the time of the hearing, but rendered his opinions regarding the deposit from the photographs in Exhibit D. (Tr. 1047, 1050-56.)

[27/] (...continued)
what could be considered the local market.

[28/] The Board has not been apprised of the current status of that patent application.

Analysis

[5] In order for a mining claim to be valid, there must be discovered within the limits of the claim a valuable mineral deposit. 30 U.S.C. § 21 (2000). A valuable mineral deposit exists where minerals are found on the claim of such quality and in such quantity that a person of ordinary prudence is justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313, 322-23 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). Thus, it must be demonstrated, as a present fact, that there is a reasonable likelihood that minerals can be extracted, removed, and marketed from the claim at a profit. United States v. Coleman, 390 U.S. 599 at 602-03. As we noted supra, there is ample evidence in the record establishing that the contestees are profitably exploiting deposits of micaceous quartzite from the Tincup claims. However, that a stone deposit on a mining claim can be profitably marketed is not alone sufficient to validate a claim located for uncommon building stone. The claimant must still establish that the deposit is not a common variety of building stone. United States v. Dunbar Stone Co., 56 IBLA at 63-64; United States v. Heden, 19 IBLA 326, 337 (1975), aff'd, Civ. No. 75-543 (D. Or. Aug. 4, 1977); aff'd, No. 77-3334 (9th Cir. Mar. 19, 1980); United States v. Heldman, 14 IBLA 1, 6 (1973).

Contestees argue that their micaceous quartzite is an unusually good quartzite that, when compared with other quartzite deposits in the area, that it demonstrates unique coloration, texture, and the capability of being split into thin sheets and broken without feathered edges. They claim that, because of these qualities, their quartzite commands a competitive edge in the market over the general run of quartzite deposits. In United States v. Dunbar Stone Co., we observed that "many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare." 56 IBLA at 66, quoting United States v. Guzman, 18 IBLA 109, 124, 81 I.D. 685, 692 (1974).

McClarty requires that a comparison be made between "the mineral deposit in question" and "other deposits of such minerals *generally*." McClarty v. Secretary of the Interior, 408 F.2d at 908 (emphasis supplied). Contestees argue that BLM failed to make a proper comparison between other common variety quartzites in nearby areas, and in fact impermissibly compared the Tincup stone only to quartzite deposits that have been previously determined to be uncommon. (Response at 23-27.) However, it is clear from the record, which we have gone to some lengths to summarize, as part of his market research, Horsburgh surveyed a variety of stone sold in stone yards, including common variety rhyolite, limestone, and quartzite.

[6] The parties are generally not in dispute concerning the characteristics which differentiate an uncommon variety quartzite deposit. [29/] They are in dispute concerning whether the deposit on the Tincup claims possesses those distinguishing properties. Judge Heffernan held that contestees proved through Cockrum's testimony that (1) "the Tincup stone can be routinely split into thicknesses of one inch or less"; (2) "the Tincup stone can be split into large sheets * * * more than two feet across"; (3) "the Tincup stone has edges which are perpendicular to the cleavage or bedding planes" and can be "split with perpendicular edges"; "the Tincup stone is rare and * * * its combined characteristics make it a unique deposit of quartzite * * * and of building stone * * * rendering it an uncommon variety * * *." (Decision at 17-18.) Additionally, he held that contestees had established a 1300-foot exposure along the Q1→Q1-A→Q5 (Q1/Q5) line. (Decision at 15.) We find, however, that the record, when taken as a whole, does not support these conclusions. In a number of critical instances, the testimony offered by contestees' witnesses is contradictory, at odds with other probative evidence in the record, or simply insufficient to establish proof by a preponderance.

We consider first the character of the deposit along the Q1/Q5 line. Contrary to Judge Heffernan's findings, Cockrum's testimony regarding the Q1/Q5 exposure is open to question. Initially, Cockrum testified that, on his January 2001 site visit, the Q1/Q5 deposit was "continuously exposed in outcrop, or in workings along a vein length of about 1,300 feet." (Tr. 1148.) In the next statement, he testified that "there were areas that were too deep in snow [along] the upper third of Q1-A" and "in the lower 300 feet of Q1-A" to "view the rock in outcrop." Id. In answer to contestees' next question, which was "were you able to view the outcrop of rock in the area of, say, Q5 and the upper portion of Q1-A?" he answered in the affirmative, even though he had just stated that the upper portion of Q1-A was buried in snow. Id. However, Cockrum did not provide any photographic evidence of the outcrop "between" Q1-A and Q5, or of any portion of the Q1/Q5 outcrop that he supposedly did see. Moreover, he had an opportunity to select stone samples from areas Q1, Q1-A, and Q5 to demonstrate the consistency of the deposit, and he did not do so. He provided sample HH, which he removed from area Q1 (Tr. 1152-55), and samples GG-1 and GG-2, which he removed from area Q6. (Tr. 1145-47.)

Nor did Thompson provide photographs which depict a continuous exposure along the Q1/Q5 line. On the contrary, from photographs E-2, E-7, and D-17, it appears that, to the extent there is a quartzite deposit connecting areas Q1 and Q5 via

[29/] Much discussion in the briefs and in Judge Heffernan's decision pertained to the "large volumes" criterion that Horsburgh listed as necessary to establish the presence of an uncommon variety quartzite deposit. (Tr. 107.) We find it unnecessary to address this issue, as our decision does not turn on that question.

area Q1-A, it is not exposed continuously at the surface. As we noted in our discussion of Areas Q1-A through Q9 supra, none of the photographs introduced by contestees demonstrates a continuous outcrop between Q1 and Q5. Exhibit I-7 and the foregrounds of Exhibits J-2 and J-7, which are the only photographs of the portion of area Q5 within the boundaries of the Tincup claims, do not support a conclusion that the outcrop at Q5 manifests bedding planes or other similarities to the quartzite at Q1. Thompson and other witnesses failed to place the outcrops depicted in Exhibits J-7, I-7, or even that in Exhibit J-6 (which is not within claim boundaries (Tr. 719-22)), in a context that enables us to conclude that they are indeed continuations of the outcrop at Q1. [30/]

We next consider the degree to which the stone exposed on the claims is composed of splittable bedding planes. As we pointed out supra, Horsburgh's Mineral Report initially described two massive quartzite deposits separated by a highly fractured middle bedded unit across the Tincup #13 and the northwestern corner of the Tincup #14 claim. (Ex. 4 at 6.) Horsburgh later concluded that the bedded unit at Q1 was not duplicated elsewhere on the claim. (Tr. 64.) While Exhibit 8, the panoramic photograph, depicts a continuous outcrop between Q1 and Q4, contestees did not assert that the length of the Q1→Q4 outcrop demonstrates bedding planes or other indicia of masonry-quality quartzite, nor does the evidence establish it. While the background portion of Exhibit J-1, which Thompson testified is a picture of stone located in Q6 (Tr. 708-09), depicts an outcrop possessing thick, uneven, and fractured bedding, Thompson's photographs J-3 and J-4, showing the "fire quartz" from area Q6 (Tr. 713-17), depict stone having no discernible bedding planes. Cockrum testified that the stone in Q6 was "splittable," but he also testified that it was "weakly foliated" (Tr. 1156-57), and he did not conclude that the Q6 deposit, as a whole, is splittable into parallel plates with perpendicular edges with a thickness of less than one-inch. He reserved that opinion for the Q1/Q5 line, including, as an afterthought, area Q4. [31/] (Tr. 1168-69.) At any rate, Cockrum produced no photographs depicting bedded layers in Q1-A, Q4, Q5, or Q6, and the photographs supplied by Thompson do not depict bedded layers comparable to those in Q1 in any of the areas designated on contestees' Exhibit C. Thus, the weight of the evidence supports Horsburgh's

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[30/] The absence of evidence documenting an exposed outcrop along the Q1-A/Q5 line lends credibility to Horsburgh's general observation in the Mineral Report that overburden had not been removed on the claims to determine if quartzite lies beneath it. (Ex. 4 at 12.)

[31/] Cockrum's initial testimony concerning the 1300-foot Q1/Q5 exposure did not include reference to area Q4. See, e.g., 1144-51, 1159. When asked directly to render an expert opinion concerning splittability, Cockrum was prompted by counsel to include area Q4 in the Q1/Q5 outcrop. See Tr. 1169.

conclusion that, other than the exposure at Q1, the quartzite on the Tincup claims is, for the most part, massive, rather than bedded.

Cockrum relied on Exhibits GG-1, GG-2, and HH, the stones he selected from the claims during his January 2001 visit, to demonstrate that the Tincup stone is splittable into even, thin layers less than an inch thick. (Tr. 1159-60, 1168.) Cockrum testified that he based his opinion about the capability of the Tincup stone to be split to less than one-inch-thick sheets upon his "own inspection, through splitting Exhibit GG-1." (Tr. 1168.) However, Cockrum did not split GG-1; he split GG-2 from a random stone he picked up at Q6. (Tr. 1147.) He selected "a rock similar in size to GG-1," and "hit it one time" with "a three-pound sledge hammer" to see what a freshly broken face would look like." (Id.) However, only one segment of the split rock was introduced into evidence, and the transcript is unclear concerning which was the split edge. Our examination of Exhibit GG-2 reveals one corner that is ¾ inch thick; the rest of the rock is between 1½ and 2 inches thick. Exhibit GG-1 is between 3 and 3½ inches thick on all sides. [32/]

Cockrum likewise testified that Exhibit HH is splittable; however, he did not attempt to split it. He failed to demonstrate how the stone actually splits, and once again, the character of the stone as split. [33/] However, a visual examination of the rocks demonstrates that Exhibit HH is qualitatively different from Exhibits GG-1 and GG-2. Exhibit HH presents a substantial horizontal fracture along what could be termed a "bedding plane"; Exhibits GG-1 and GG-2 are, as Cockrum testified, not highly foliated. Exhibit HH, while having horizontal cleavage that appears to be splittable, also demonstrates the potential for "feathered edges" that were the subject of much testimony by the experts for both sides. Simply put, while contestees testified that the stone can be split, they did not provide samples of stone, photographs, or any other evidence that establishes by a preponderance of the evidence that the Tincup stone–even that in Q1–is consistently splittable into the thin, even sheets described by Horsburgh and Cockrum as distinguishing quartzite of uncommon variety.

[32/] Exhibits GG-1 and GG-2 are less than 6 inches in length.

[33/] Thompson's testimony was that barring the stone out and splitting it is too time consuming and labor intensive, so he blasts it out, but blasting inhibits the production of thinner stone, as it causes the stone to fracture. (Tr. 556-60, 652, 658-59.) Rodriguez also testified that blasting inhibits splittability, and consequently, the production of thinner pieces of stone, due to "microfracturing." (Tr. 1042.) As we discuss infra, the weight of the evidence is that Thompson did not find it economical to produce thin sheets of stone, a factor associated with uncommon variety building stone. See United States v. Pope, 25 IBLA 199, 203-04 (1976), reaff'd on reconsideration, 27 IBLA 133 (1976).

In point of fact, Horsburgh's analysis of the deposit emphasized the question of consistency: The Tincup quartzite does not possess *consistent* cleavage surfaces that allow the stone to be split into uniform thicknesses (Ex. 4 at 12); the quartzite bedding planes are not of *consistent* thickness, with beds of 2 inches or less "almost non-existent" (Ex. 4 at 10); fractures in the deposit prevent removal of *consistently* large pieces from the deposit (e.g., Tr. 97-98); the stone sorted into pallets by Thompson does not demonstrate *consistently* thin, even-edged stone, and *consistently* large, flat plates (Tr. 96-98). The Tincup stone does not demonstrate consistent uncommon quality, or thin, consistently flat, large planer surfaces with perpendicular edges. (Exs. 23-28, Tr. 127, 132-35; see also Tr. 106-07; 516-17.)

We must agree that the thread running through the entire body of evidence with respect to the character of the Tincup deposit is that it does *not* produce stone of *consistent* uncommon quality. While the photographs in Exhibit D, which are primarily located in area Q1, show highly fractured quartzite beds of varying thicknesses, there is no question that they also depict some degree of foliation beyond that demonstrated in the other outcrops. However, we find no basis in the record, when considered as a whole, for Judge Heffernan's conclusion that the stone can be removed, even from area Q1, on a routine basis in "large pieces more than two feet across," that it can be "routinely split into thicknesses of one inch or less," or that it can be "split with perpendicular edges." (Decision at 17.) Cockrum's testimony does not overcome the Government's case that the stone can routinely be split to less than an inch thickness (see SOR at 28-29), as Cockrum provided no solid factual basis to support it. Thompson's testimony was that the stone his father split by hand was between 1 and 2½ inches in width (Tr. 536), and most of the stone barred out comes out in 2- to 3-inch thicknesses (Tr. 559, 565). Thompson also testified that he has not efficiently achieved removal of the stone without blasting (which results in further fracturing and loss of quality), and that he does not bar out and split the stone like his father did because the process is, in essence, not economical. (Tr. 556-57, 560, 575.) In United States v. Dunbar Stone, 56 IBLA at 67, we noted that drilling and blasting stone, then splitting with a maul or hammer and chisel, is a "time-consuming and expensive process associated with the removal of common stone." [34/]

[34/] We are not unmindful that Rodriguez testified that better mining methods could enhance the removal of better quality stone. That testimony ultimately concerns the question of marketability, rather than the character of the stone itself. See United States v. Vaughn, 56 IBLA 247, 255-56 (1981). Rodriguez also testified that, at his own quarry, workers split the stone with hammer and chisel. (Tr. 1024.) While we noted in Dunbar that barring stone out could be evidence of the ease with which stone could be removed, Thompson testified that, in this case, barring the stone out is time-consuming and labor intensive. (Tr. 556-57, 560.) The (continued...)

Thus, the evidence taken as a whole, including photographs and rock samples entered into evidence by contestees, simply does not support a finding that the Tincup deposit intrinsically possesses a unique property giving it distinct and special value. While contestees offered much testimony concerning the isolated stone in a pallet or at the quarry that meets the uncommon criteria, the presence of isolated stones that conform to criteria defining a stone as uncommon variety does not establish, by a preponderance of the evidence, that the deposit is of uncommon variety. However, our analysis does not stop here.

[7] McClarty adopted the concept from United States v. U.S. Minerals Development Corporation, 75 I.D. at 134-35, that the criteria for judging whether a mineral material deposit has a "special and distinct value" must include an economic test. McClarty v. Secretary of the Interior, 408 F.2d at 908, 909. Subsequent to McClarty, our case law has often restated the principle that the unique value must be reflected by the higher price which the material commands in the market, or reduced cost of production resulting in greater profit. See, e.g., Mid-Continent Resources, Inc., 148 IBLA 370, 377 (1999), and cases cited. Quoting United States v. Multiple Use, Inc., 120 IBLA at 79, which states: "Once a common variety sales price is established, evidence of an arm's-length purchaser's willingness to pay much more than the 'common variety price' for a particular mineral material strongly supports a finding that the deposit of that material is intrinsically unique" (Decision at 23), Judge Heffernan held that contestees established both that they can produce their stone at a reduced cost of production and that their stone commands a higher price in the marketplace because of its intrinsic qualities. Id. at 24.

Other than his testimony, Thompson offered no record of what his actual mining costs were for any representative period of time, except for a sole 1982 receipt, Exhibit L-8, which recorded costs of $25 for handling ½ ton of stone, or $50 a ton, which is substantially higher than the $5 to $15 per ton he testified represented costs in 2001. (Tr. 634, 640.) Accordingly, we are left with testimony that cannot be verified and is, in the final analysis, self-serving. [35/] Thompson no doubt reduces costs by blasting the stone and delivering it in bulk. Even if he had provided documentation of cost savings due to bulk sales, this method of savings cannot be said to result from any special and distinct property of the rock, as it is a method associated with the removal of common variety materials. United States v. Dunbar Stone, 56 IBLA at 67;

[34/] (...continued)
photographs in Ex. D depicting the Q1 deposit, which, Thompson stated, "dips at about a 10-20 degree angle into the mountain," support Thompson's assessment.

[35/] In their Response at 27, contestees stipulated to Horsburgh's $60 per ton mining cost estimate for palleted stone, see Tr. 377; however, that was not Thompson's testimony.

compare United States v. Pope, 25 IBLA at 209 ("Cliffstone" possessed "unique qualities give it a decided economic advantage over other competitive types of stone," as "[t]here is a minimum of preparation expense with Cliffstone because it is used as it comes from the quarry with no blasting or barring loose necessary.") While Rodriguez testified that he could mine the stone without blasting for between approximately $30 and $50 a ton, his calculations assume that the deposit would be mined at a rate of 72 tons per day seasonally. (Tr. 1070-71.) This analysis is purely speculative and formulated without any actual involvement by Rodriguez with the deposit. We thus reject Judge Heffernan's conclusion that contestees established that the intrinsic nature of the deposit engenders reduced mining costs.

We turn to the question of whether the stone on contestees' claims possesses some intrinsic property that commands a premium price in the marketplace. Relying upon United States v. Foley, 142 IBLA 176, 185 (1998), Judge Heffernan held that contestees were not required to demonstrate actual sales, but were required only to demonstrate a potential market for the product "at a price making it special and unique." (Decision at 19.) He held that the testimony of Galust Berberian satisfied this burden, because Berberian pays $250 per ton for bulk stone, which is higher than the $203 per ton Northern Stone Supply commanded for Oakley stone. Id. As Judge Heffernan's stated:

> Mr. Berberian testified that he has historically paid $250.00 to $300.00 per ton for Tincup Stone. Tr., 907. Some of the payments were in the form of barter in exchange for Mr. Berberian's paintings, and some of the payments were for cash. Tr., 907-08. Mr. Berberian testified that when he paid cash it was usually at the $250.00 per ton rate. Tr. 907. Mr. Berberian testified that he has purchased approximately 200 tons of stone from Tincup at these prices. This is the retail price to Mr. Berberian. BLM's Exhibit 4, Table 1, also sets out the prices per ton for Oakley micaceous quartzites, FOB at the quarry. The most expensive stones listed in BLM's Table 1 are White Mist and Klondike Gold, micaceous quartzites sold by Northern Stone Supply, at a price of $203.00 per ton, FOB at the Northern Stone quarry. Mr. Thompson testified that his palletized cost, FOB at his mill site number 16 was merely $25.00 per ton. Tr., 637. The BLM's Table 1 reflects the prices per ton for Oakley micaceous quartzites ranging from $75.00 to $203.00 per ton, FOB at the quarry. The administrative record does not disclose what the transportation and delivery costs for White Mist and Klondike Gold would be to Mr. Berberian's location. However, the record does disclose that he is located in Madison County, which is within the Idaho Falls region. Tr., 905. The regional transportation and delivery costs for White Mist and Klondike Gold would have to be $47.00 per ton in order

> to equal the lowest retail price of $250.00 per ton, which Mr. Berberian testified that he has repeatedly paid for Tincup stone. While the record does not disclose what the delivered prices for White Mist and Klondike Gold would be to Mr. Berberian's location in Madison County, Idaho, it is, none-the-less, obvious that at $250.00 per ton retail, Mr. Berberian was paying a premium retail price for his Tincup stone, which price was on an approximate par with the prices for White Mist and Klondike Gold.

(Decision at 22-23.)

We note that our decisions in Foley and Multiple Use did not hold that evidence of a buyer's willingness to pay a premium for stone over common variety pricing per se establishes intrinsic uniqueness of the stone. Our decisions caution that such a finding must be predicated on a unique property inherent in the deposit itself, and not on extrinsic factors. See, e.g., United States v. Henri (On Judicial Remand), 104 IBLA at 98-99, citing United States v. Smith, 66 IBLA 182, 188 (1982), and United States v. Heden, 19 IBLA at 326.

As noted by Judge Heffernan, price information reported by Horsburgh in his market survey of other stone producers was the FOB quarry price. BLM's argument on appeal that Judge Heffernan confused the FOB quarry price with the retail price is well-taken. See SOR at 27. Horsburgh pointed out in his Mineral Report, at 15, that "a complex price structure surrounds the stone industry" to account for different types of transactions. His description of the complexity of the sales process is instructive:

> [Some] businesses operate the quarries and sell to distributors who then market the stone in a wider geographic area. Other businesses operate the quarry and maintain their own distribution centers. Several sales of a particular stone may be involved before the stone ultimately reaches the consumer. For example, a producer may sell to a distributor FOB at the quarry. This distributor will transport the material to a second distributor from another geographic area. The second distributor moves the material to his yard where it may sell to landscape companies or to private construction contractors who will transport the material to the job site. Consumers may purchase materials at any of the sales points.
>
> * * * A producer may sell directly from the quarry but may market the same product at several prices depending on who buys it. A producer may have "wholesale" prices for distributors who buy large quantities, "contractor" prices for local construction firms that are higher than wholesale prices but lower than retail prices, and a "retail" price for

> consumers who do their own construction work. Similarly, a distribution company "dealer" may have its own price structure.

(Mineral Report at 15.) Horsburgh testified that the FOB quarry price was the "value of the material plus the mining and the palleting costs." (Tr. 165.) He also testified that wholesale prices are normally doubled when selling retail (Tr. 166), and that wholesale prices include the FOB quarry price plus transportation costs. Id.

The contestees did not dispute this general analysis of price structure. Thompson stated that he does not sell to stone yards because he prefers to retail the stone rather than wholesale it. (Tr. 652-53.) In the case of the contract with Action Landscaping, Action removes the stone from the quarry and pays $100 per ton. (Tr. 791.) BLM argues that Thompson's FOB quarry price is actually $100 per ton, and that Judge Heffernan erred in comparing the retail price at which Thompson sold stone to Berberian with the FOB quarry prices set out in Horsburgh's market survey. (SOR at 26-27.)

We agree. The FOB quarry price is not equivalent to the retail price of the product to the end user. It is equal to the price received for the stone at the quarry. In the case of Action Landscaping, delivery was at the quarry. Under these circumstances, the price received at the quarry is in fact the FOB quarry price, which is the only value to which a proper comparison to BLM's market survey prices is properly to be compared.

Contestees argue that when compared with FOB quarry prices reported by Horsburgh for common variety stone, the Tincup stone commands a premium, even when sold FOB quarry to Action Landscaping at $100 per ton, which contestees argue, is "pure profit." [36/] (Response at 28.) There is no proof in the record that the stone sold to Action Landscaping is anything other than common variety stone. [37/] In order

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[36/] Contestees did not establish that 2001 prices were equivalent to 1997 prices, or, in the alternative, adjust for the difference between them.

[37/] Similarly, Berberian testified that he does not buy the Tincup stone for its thinness or other uncommon qualities (Tr. 916-17), but because its color and texture fit the landscape. (Tr. 909.) Color has been rejected as a basis for rendering a building stone an uncommon variety. See, e.g., United States v. Dunbar Stone, 56 IBLA at 65, and cases cited.

We cannot accept Berberian's assertions of value standing alone based upon his assessment of the value of his own artwork, where there is neither an independent verification of the value of the art nor an independent verification that others purchased Tincup stone at the price that Berberian ascribed to the art traded

(continued...)

to establish that stone is in fact uncommon building stone, it must command a higher price in the marketplace because of its "special and distinct value." McClarty v. Secretary of the Interior, 408 F.2d at 907. Contestees did not enter evidence into the record establishing that this was the case.

The receipts at contestees' Exhibit L, summarized supra, as well as Thompson's testimony, demonstrate that Thompson realizes profits based upon a strategy of retailing stone to the end user, thereby bypassing wholesalers, distributors, and private contractors who are engaged in the construction business. [38/] Additionally, he avoids mining costs associated with processing stone in a manner that would achieve a thinner, larger product, which the masonry industry values as higher quality. In the case of Action Landscaping and Custom Backhoe, [39/] the purchasers are actually private contractors who have contracted to remove stone at a wholesale price. Although their agreements with Thompson are sales contracts, Thompson is also trading upon his status as a mining claimant to subcontract the right to remove a certain amount of stone over a specific period.

An attribute in a deposit of building stone which imparts a distinct and special value reflected by either a higher price for the product or reduced costs of production resulting in a higher profit must be predicated on a unique property inherent in the deposit itself, and not on extrinsic factors. United States v. Henri (On Judicial

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[37/] (...continued)
for the stone. We would be unable to accept as fact a valuation for any mineral ascribed to that mineral by an artist who traded his or her art for the mineral. To do otherwise asks the Government to become, in the context of mineral examinations, art appraisers.

[38/] While Thompson testified that he may "wholesale" a larger volume of stone when negotiating a trade (Tr. 780), whether a sale is wholesale or retail is determined by whether the sale is or is not to an end user. The highest price-per-ton sale recorded on the table, documented at Ex. L-4, reports a price per ton of $350. That sale was to an end user, Robert Moore, an associate of Berberian's (Tr. 772), located in Declo, Idaho, near Twin Falls (Tr. 770). Thompson delivered the stone in bulk to Moore, allocating $100 per ton for travel. (Tr. 774.) Thompson's price list, quoted by Horsburgh in his Mineral Report suggests that his 6 to 8 inch stone wholesales for $250 per ton, and his thin stone (1 inch or less) wholesales for $350 per ton. However, the record does not support this representation, as the few sales that have been documented at those prices have been for bulk stone sold to end users.

[39/] Thompson testified that he had engaged in a future contract with Custom Backhoe and Landscaping under terms similar to those negotiated with Action, at $100 per ton. (Tr. 802-05.)

Remand), 104 IBLA at 98-99, and cases cited. Accordingly, where profits inuring from the sale of building stone have resulted primarily from commercial arrangements which have captured for the mining claimant a larger portion of the total value added to the stone as the result of its entry into the stream of commerce, and not from any unique property intrinsic to the deposit, mining claims located for uncommon building will be declared null and void. See United States v. Foley, 142 IBLA at 188, citing United States v. Henri (On Judicial Remand), 104 IBLA at 98-99; see also United States v. LeFaivre, 138 IBLA at 68; United States v. Smith, 66 IBLA at 188.

In conclusion, while contestees offered testimony countering BLM's prima facie case charging that the Tincup stone deposit does not possess special and distinct characteristics rendering it an uncommon variety, the weight of the evidence, including photographs and other documentary and demonstrative evidence introduced into the record by contestees as well as by BLM, is not supportive of many key points that contestees advanced by their testimony. Additionally, contestees did not establish that profits they have received from the sale of the Tincup stone inure from unique properties intrinsic to the stone. Accordingly, we find, contrary to Judge Heffernan's findings, that contestees did not meet their burden of overcoming BLM's prima facie case by a preponderance of the evidence. [40/]

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we affirm as modified that portion of Judge Heffernan's decision denying BLM's motion to dismiss the proceedings; we reverse that portion of his decision declaring the Tincup #12, #13, and #14 mining claims and the Tincup #16 mill site claim valid; and we affirm that portion of his decision declaring the Tincup #17 mill site claim invalid.

James F. Roberts
Administrative Judge

[40/] Arguments advanced by the parties and findings of fact and conclusions of law rendered by Judge Heffernan contrary to our findings herein have been considered and rejected.

I concur:

Christina S. Kalavritinos
Administrative Judge